Supreme Court, U.S.
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In The

Supreme Court of the United States

BANKRUPTCY RECEIVABLES MANAGEMENT,

Petitioner,

v.

CHARLES and JULIE LOPEZ,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Chapter 7 bankruptcy debtor has a right under the Bankruptcy Code to obtain a discharge of his debt to a secured creditor and thereafter continue to retain that creditor's collateral without carrying out one of the apparently exclusive methods of retention set forth in Bankruptcy Code §521(2) and applicable here of either reaffirming the debt or redeeming such collateral.

LIST OF PARTIES

The caption of the case contains the names of all of the parties.

CORPORATE DISCLOSURE STATEMENT

Petitioner, Bankruptcy Receivables Management, is a California company that has no parent company, and no publicly held company owns any stock or other interest in it.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Bankruptcy Receivables Management ("BRM"), respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit ruling is reported as *Bankruptcy Receivables Management v. Lopez*, 345 F.3d 701 (9th Cir. 2003) (App. 1). Such ruling is consistent with and was found to be dictated by that court's 1998 decision in *McClellan Fed. Credit Union v. Parker (In re Parker)*, 139 F.3d 668 (9th Cir. 1998) *cert. denied*, 525 U.S. 1041, 119 S.Ct. 592, 142 L.Ed.2d 535 (1998) (App. 19). An intermediate appellate decision was also rendered below by the Bankruptcy Appellate Panel of the Ninth Circuit, *Bankruptcy Receivables Management v. Lopez*, 274 B.R. 854 (9th Cir. BAP 2002) (App. 31), affirming the underlying unreported decisions of the United States Bankruptcy Court for the Eastern District of California. (App. 56, 75 & 92).

JURISDICTION

The judgment of the court of appeals was entered on September 26, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The appeals to the bankruptcy appellate panel and the court of appeals were each timely perfected and authorized, respectively, under 28 U.S.C. §158(b) and (d).

STATUTE INVOLVED

The statute involved is Bankruptcy Code §521, 11 U.S.C. §521, which provides in pertinent part:[1]

[1] The full text of Bankruptcy Code §521 is reproduced in the Appendix (App. 122).

§521. Debtor's duties. The debtor shall –

* * *

(2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate –

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title . . . the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;

(B) within forty-five days after the filing of a notice of intent under this section . . . the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and

(C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title;

STATEMENT OF THE CASE

This case presents an issue implicated on a recurring basis in thousands of individual Chapter 7 bankruptcy cases nationwide, and one conservatively estimated to affect the treatment and disposition of half a billion[2] dollars of consumer credit annually. The issue is highly

[2] *See* Clark, Leif M. *Two Second Circuit Decisions – Which One Really Matters?*, Amer. Bankr. Instit. Jrnl, Vol. XVII, No. 4, May 1998 at 32 (conservatively estimating that $500 million, just of auto loan obligations, is implicated in this issue annually).

divisive, pitting Chapter 7 debtors against secured consumer lenders daily before the bankruptcy courts, and leaving bankruptcy and higher courts to wade through the legal tangents[3] emanating from their sharply divided opinions.

Nine courts of appeals have addressed this issue, and their decisions are irreconcilable. Four circuits have held that §521(2) (entitled "Debtor's duties"), plainly read, provides for a *per se* rule and unequivocally mandates that a Chapter 7 debtor, in dealing with a consumer debt that is secured by property of the bankruptcy estate, is limited to, and has a duty to specify and carry out, one of the retention options expressly set out there and either (in the typical case) reaffirm the debt or redeem the secured creditor's collateral. These circuits have found that a Chapter 7 debtor has no right under the Bankruptcy Code to obtain a discharge of his debt to a secured creditor and thereafter continue to retain its collateral without a reaffirmation or redemption. This *per se* view was most recently adopted by the First Circuit, the latest circuit to address this issue. *BankBoston, N.A. v. Burr (In re Burr)*, 160 F.3d 843 (1st Cir. 1998). (App. 107)

A fifth circuit ruled, even before the provisions of §521(2) had become part of the Bankruptcy Code in 1984, that a Chapter 7 debtor was limited to choosing from among the retention options Congress expressly set out in the Bankruptcy Code (just as §521(2) later appears to have provided), and could not obtain a discharge of his debt to a secured creditor and thereafter retain its collateral simply by continuing to make payments. *In re Bell*, 700 F.2d 1053, 1056-58 (6th Cir. 1983).

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[3] *See*, for example, *In re Lair*, 235 B.R. 1, 4 (Bankr. M.D. La. 1999) (commenting on navigating "through the precipices, tar-pits, rapids, and sloughs that comprise the span of jurisprudence about 11 U.S.C. §521(2)").

Contrary to the *per se* rulings of those five circuits, four circuits, including the Ninth Circuit below, relying on *In re Parker*, 139 F.3d 668 (9th Cir. 1998), finding apparent ambiguity in §521(2) and with that an entrée to stray from what appears to be its literal command, have held that a Chapter 7 debtor is *not* necessarily limited by §521(2) to the retention options Congress expressed there. *Parker* holds that although Bankruptcy Code §521(2) appears to provide that a Chapter 7 debtor desiring to retain a creditor's collateral "shall perform" one of the three[4] retention options outlined in §521(2) in seemingly exclusive fashion, a Chapter 7 debtor actually holds an unexpressed "fourth" retention option or "right", referred to by some as a "retain-and-keep current"[5] option. Rejecting a *per se* rule and applying instead what is principally a "facts and circumstances" approach, those four circuits have found that under this "fourth option" a debtor may obtain a discharge of his debt to his creditor and yet thereafter retain its collateral simply by continuing to make payments and without ever reaffirming the debt or redeeming the collateral.

Permeating the analysis and dictating the ruling below is the Ninth Circuit's holding in *Parker* that such a retention "right" exists. *Parker* and other "fourth option"

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[4] The three retention options set out in Bankruptcy Code §521(2) are to *reaffirm* the debt (as provided in §524(c)), to *redeem* the property (as provided in §722), or to retain it through an *exemption* and related lien avoidance proceeding such as under §522(f). Because the retention option of exempting property is not applicable here (and is infrequently implicated) where the lien rights have arisen consensually or by way of a purchase-money security interest, for the sake of simplicity, only the retention options of reaffirming or redeeming will be referenced and discussed.

[5] The First Circuit in *Burr*, 160 F.3d 843, 847 (1st Cir. 1998), referred to this judicially-created "option" as a "retain-and-keep-current", and flatly rejected the notion that it can be found to exist.

courts that judicially engraft such a theretofore non-existent retention "right" onto the Bankruptcy Code confer upon Chapter 7 debtors the "best of all worlds" by permitting them to discharge their "personal liability"[6] to their secured creditor and yet continue to hold its collateral and expose it to risk of loss, without recourse. Such a retention "right" permits a Chapter 7 debtor to foist a new, debtor-favored, non-recourse relationship[7] upon his creditor, and to thereby "adjust" the debtor-secured creditor relationship in a manner not permitted in a Chapter 7 case, but reserved only for Chapter 13 cases. Predictably, this retention option or "right" has been overwhelmingly embraced by Chapter 7 debtors in the four circuits in which courts have made it available, with virtually no Chapter 7 debtors in those circuits performing the reaffirmation option – thereby making a mockery of the retention options Congress expressly provided in §521(2), as has been pointedly observed. *In re Burr*, 160 F.3d at 848 (1st Cir. 1998).

With the development of this issue over the intervening years, the analyses in *Parker* and of the Second Circuit in *Capital Communications Federal Credit Union v. Boodrow (In re Boodrow)*, 126 F.3d 43 (2nd Cir. 1997), *cert. denied*, 522 U.S. 1117, 118 S.Ct. 1055, 140 L.Ed.2d 118

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[6] Although colloquially referred to as "discharging the *debt*", a discharge does not extinguish the debt itself but only the bankruptcy debtor's "personal liability" for it. Bankruptcy Code §524(a)(1). Mortgages, security interest and other liens on property that are not subject to being avoided in a bankruptcy case remain, however, and such *in rem* rights "pass-through" the Chapter 7 case unaffected by that "personal liability" discharge. *Johnson v. Home State Bank*, 501 U.S. 78, 82-83, 111 S.Ct. 2150, 2153, 115 L.Ed.2d 66, 73-74 (1991); *Long v. Bullard*, 117 U.S. 617, 6 S.Ct. 917, 29 L.Ed. 1004 (1886). Such *in rem* rights may then be realized upon up to the amount of the "discharged" debt.

[7] *See Burr*, 160 F.3d at 848, commenting that it is "extraordinarily rare" that a consumer loan would ever be nonrecourse.

(1998), in particular, can now readily be shown to be flawed – and profoundly so. The defects and omissions in those and other decisions in which such a "right" has been created, now fully evident after the more than 10-year period[8] during which this issue has simmered and been debated, are surprisingly glaring, and this retention "right" cannot stand on any principled legal basis.

There is an acute and compelling need for this Court to take up and resolve this issue now since, beyond this principal dispute, the evolutionary effect of the required recognition of this highly dubious "right" by bankruptcy and other lower courts in "fourth option" circuits over the past decade has resulted in a casting aside of important rights and entitlements as between debtors and their secured creditors, and of Congress' careful balancing of their interests. Moreover, the judicial creation of this "right" has had the damaging effect of supplanting the certainty that Congress provided for the debtor-secured creditor relationship with tentativeness and uncertainty, and spawned a resulting second tier of costly, wasteful and litigious conflicts of similar recurrence. This Court should resolve this principal conflict, which has irreconcilably split the circuits, and thereby also halt the further evolution of a myriad of now fully-manifested second-tier disputes and litigation.

FACTUAL BACKGROUND AND DISPOSITIONS OF COURTS BELOW

Prior to filing their Chapter 7 petition with the United States Bankruptcy Court for the Eastern District of

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[8] The Ninth Circuit observed that "This disagreement between the circuits regarding the proper construction of §521(2)(A) continues to exist." *Bankruptcy Receivables Management v. Lopez*, 345 F.3d at 707 (9th Cir. 2003).

California on August 3, 1998, Charles and Julie Lopez (the "Debtors" or the "Lopezes") had purchased various items of jewelry, including a 1 carat diamond, a Tiffany pendant, two gold necklaces and a diamond ring (the "Property"), from Samuels Jewelers, Inc. ("Samuels"), having a combined purchase price of $5,623.01. The purchases were financed, with the Lopezes agreeing to make monthly payments to Samuels and with Samuels taking back a purchase-money security interest in the Property as security for the debt. In the papers filed with their Chapter 7 petition, the Debtors identified Samuels as holding a security interest, and in their Bankruptcy Rule 1007(b)(2) "Statement of Intention" they indicated their intention to retain its collateral by reaffirming the debt to it. Despite that, however, and despite that BRM (then Samuels' assignee) repeatedly offered the Debtors an opportunity to reaffirm, at no point did the Lopezes reaffirm the debt, nor did they redeem or surrender to BRM its collateral, either.

BRM, in a September 25, 1998 letter to the Lopezes' bankruptcy counsel, inquired as to the Debtors' intentions in dealing with the secured Property, and indicated its willingness to accept either a redemption of the Property or a reaffirmation of the obligation, including with such letter a proposed reaffirmation agreement. Shortly thereafter, on November 5, 1998, the Lopezes received their Chapter 7 discharge, discharging their personal liability to BRM, following which they continued to retain the Property, including at all times after their Chapter 7 case was closed on December 1, 1998.

The Lopezes acknowledged that they stopped making monthly payments to Samuels or BRM on the obligation after their Chapter 7 filing. On February 4, 1999, some five months after BRM had sent its first letter, with the Debtors having done nothing in response thereto and, in

light of the ensuing discharge, the opportunity to reaffirm having then passed,[9] BRM sent a second letter to the Lopezes' counsel, noting there the lost opportunity to reaffirm and explaining that its security interest in the Property had passed through the bankruptcy case unaffected by the discharge. It requested, given the Lopezes' failure to either reaffirm the debt or redeem the Property, that the Property be returned. Through this letter, BRM explained that if the Debtors nonetheless wished at that late juncture to retain the Property they could do so either by paying a lump-sum cash settlement "or a new agreement for monthly payments based on its fair market value". The letter recited that, in that event, "if the enclosed agreement for monthly payments is acceptable, please instruct your client to sign and return it to our office within ten days along with a check for the initial monthly payment." The agreement accompanying that letter was a Post-Discharge Property Retention Agreement ("PDPRA").

The Debtors, in ensuing discussions with BRM, reiterated their desire to retain the Property. Because they had not received the PDPRA through their counsel, BRM sent to the Lopezes directly a second proposed PDPRA, which was eventually signed. In it, the Debtors acknowledge their default but also their desire to retain the Property. The PDPRA provides that BRM would forebear from taking "legal action to recover the secured property" provided that the Debtors paid BRM the principal sum of $3,030.35, plus interest, through payments of $100/month. The parties agreed in the PDPRA that the Property had a value at least equal to the $3,030.35 amount set forth therein, as a BRM appraisal later confirmed.

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[9] *See In re Brinkman*, 123 B.R. 611, 612 (Bankr. N.D. Ind. 1991) (to be effective, reaffirmation agreement must be entered into before discharge) (collecting cases).

The PDPRA openly recites at numerous points that the Debtors received a bankruptcy discharge and, appropriately, given the acknowledged defaults, that BRM had "the right to pursue and recover the Secured Property for this discharged debt. . . . " It is expressly stated in the PDPRA that "this is not a Reaffirmation Agreement." In a declaration to the PDPRA, the Debtors acknowledge "that they are not required to sign this Agreement." The Lopezes marked up the PDPRA by crossing out the $100 per month payment proposed therein, inserting instead the amount of $85, and initialing that change. They signed and forwarded it to BRM, which signed it on March 4, 1999. The Lopezes then made one installment payment of $85.00 to BRM and later issued a check for $170.00 (representing two further payments), but stopped payment on that.

In October 1999, the Debtors, then represented by different counsel, filed a motion to reopen their bankruptcy case for the purpose of filing a complaint against BRM, with that motion being granted the following month. The Debtors filed a four-count bankruptcy court complaint against BRM for alleged violations of the discharge order, fraud, undue influence, and malice. The bankruptcy court eventually dismissed all counts except one – that alleging a violation of the so-called "discharge injunction" found in Bankruptcy Code §524(a)(2). (App. 105-06) In a later ruling, the court also held that the Debtors may have had a right under *Parker* to retain the Property by voluntarily abiding by the remaining terms of the original contract, and as such the PDPRA may not have been supported by new consideration. (App. 87)

The bankruptcy court eventually found that a post-bankruptcy agreement entered into between the Debtors and BRM could be rescinded under California law, and, alternatively, that, in light of *Parker,* it was invalid as not supported by new consideration. (App. 67) The bankruptcy court's determination was upheld on appeal by the BAP in

Bankruptcy Receivables Management v. Lopez, 274 B.R. 854 (9th Cir. BAP 2002) (App. 31), and BRM's appeal to the Ninth Circuit followed.

The Ninth Circuit focused exclusively[10] on the Debtors' and BRM's relative rights, duties, and entitlements under the Bankruptcy Code, framing the issue as:

> This case addresses the question of whether a creditor may enforce a post-bankruptcy discharge agreement entered into with a debtor retaining the collateral pursuant to its *rights* under *McClellan Fed. Credit Union v. Parker (In re Parker)*. . . . (emphasis added).

Lopez, 345 F.3d at 703.

The Ninth Circuit, perceiving the PDPRA as a disguised or otherwise ineffective reaffirmation agreement, held that the PDPRA was unenforceable because there was no new consideration for it. That is, under *Parker*, the Debtors already had a "fourth option" or "right" to retain the Property simply by continuing to make payments and BRM's forbearing from exercising its *in rem* rights and its permitting the Debtors to retain its collateral thus provided no new consideration:

> BRM's supposed consideration, forbearing its foreclosure right in exchange for the repayment of the discharged debt, is hardly additional consideration because under *Parker* the Lopezes were entitled to retain the jewelry and continue to make payments.

Lopez, 345 F.3d at 710.

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[10] The Ninth Circuit found that "Because the agreement [the PDPRA] is invalid under federal bankruptcy law, there is no need to review the agreement pursuant to California contract law." *Lopez*, 345 F.3d at 710.

Thus, at the heart of the ruling below is the Ninth Circuit's determination in *Parker* that a Chapter 7 debtor has a "right" under the Bankruptcy Code to discharge his obligation to his secured creditor and yet continue to retain its collateral without reaffirming the debt or redeeming that collateral.

REASONS FOR GRANTING THE PETITION

This petition should be granted because: i) there is a now decade long irreconcilable split in the circuits on this principal issue of what should be uniform federal law, and it is of a highly recurring nature; ii) the judicial creation of this retention "right" has thrown the statutorily-established balance of rights, duties, and entitlements as between Chapter 7 debtors and their secured creditors, which Congress has carefully crafted in the Bankruptcy Code, badly out of kilter; and iii) the declaration of such a "right" has supplanted the legal certainty Congress had ordained with conflict-engendering uncertainty, spawned and encouraged a predicted second tier level of nettlesome, costly and wasteful litigation, and both nullified rights and interest found elsewhere in the Code and undercut, in practice, precedent established by this Court.

I. There Is an Irreconcilable 5-4 Conflict Between the Circuits on this Important and Recurring Issue and Need For A Uniform Federal Rule

The United States Courts of Appeals for the First, Fifth, Seventh and Eleventh Circuits have found that Bankruptcy Code §521(2) unambiguously announces a *per se* rule, and limits a Chapter 7 debtor's retention options to the three Congress expressly enumerated. *Burr*, 160 F.3d 843 (1st Cir. 1998); *Johnson v. Sun Fin. Co. (In Matter of Johnson)*, 89 F.3d 249 (5th Cir. 1996); *Matter of Edwards*, 901 F.2d 1383, 1385 (7th Cir. 1990) and *Taylor v. AGE Federal Credit Union (In re Taylor)*, 3 F.3d 1512 (11th

Cir. 1993). Even before and independent of the addition of §521(2) to the Bankruptcy Code in 1984, the Sixth Circuit, one year earlier, in *In re Bell*, 700 F.2d 1053, 1056-58 (6th Cir. 1983), held that a Chapter 7 debtor who desired to retain secured property had to redeem or reaffirm, and had no right to obtain a discharge and retain the secured creditor's collateral simply by continuing to make payments. *See In re Taylor*, 3 F.3d at 1515, n.3 (explaining consistency between its ruling and *Bell*).

In *Burr*, the First Circuit rejected the notion that §521(2) could be read to confer on a chapter 7 debtor any such "fourth option". *Burr*, 160 F.3d at 847. The debtors in *Burr* were "current" in their payments and they and an amicus argued unsuccessfully that, because of that, the debtors should not be put to the choice of either a reaffirmation or a redemption, but rather, should be permitted to retain the collateral simply by maintaining payments. The central point emphasized in *Burr* is that a chapter 7 debtor, whether current or not, holds no such "retain-and-keep-current" retention "right":

> 11 U.S.C. §521(2) unambiguously requires chapter 7 debtors wishing to retain property of the estate that secures a consumer debt to elect one of the retention options specified in 11 U.S.C. § 521(2)(A), and then to perform the elected option in accordance with § 521(2)(B).
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> * * *
>
> Chapter 7 debtors do not, of course, enjoy a free-standing right under the Bankruptcy Code to retain property securing a consumer debt merely by keeping current on their payments under old loan agreements.
>
> * * *
>
> . . . the loss of such state law rights is one of the costs of a chapter 7 discharge.

160 F.3d at 848-49. Similarly, in commenting on §521(2), the Eleventh Circuit in *Taylor* noted that:

> Courts must apply the law as enacted by Congress. The statutory language [in §521(2)] clearly expresses congressional intent, and, in the absence of any ambiguity, [this] court [will] not read another meaning into the statute to arrive at a more preferable result.

3 F.3d at 1517 (citations omitted).

There are thus five circuits that agree with the BRM's position that a Chapter 7 debtor is limited to those retention rights expressed in the Bankruptcy Code.

Straddled somewhat in the middle is the Tenth Circuit, which acknowledges that the language of §521(2) is unambiguous and that its terms, indeed, clearly limit a debtor's options to those expressed in that statute. *Lowry Federal Credit Union v. West*, 882 F.2d 1543, 1545, n.2 (10th Cir. 1989) ("the plain English of the section [§521(2)] . . . requires a debtor who decides to retain property to elect to redeem or reaffirm. No other meaning can be gained from the precise terms of the statute, and nothing suggests the debtor can simply elect to retain the property and ignore the other duties required by §521(2)"). Oddly, despite that observation, that court, finding no Bankruptcy Code provision specifically detailing what happens if the debtor does not do what §521(2) commands and viewing that as opening the door to apply a "facts and circumstances" approach, ultimately held that it should be up to the bankruptcy court to decide, based on the facts of each case, whether a creditor has shown sufficient "actual prejudice" to warrant limiting the debtor to performing one of §521(2)'s expressed options. The Tenth Circuit,

therefore, announces a requirement that a creditor[11] must first show "actual prejudice" (a phrase and concept nowhere appearing in §521(2)) before a debtor's options will be limited to those expressed in the statute.

The Tenth Circuit has been joined by the Second, Fourth and Ninth Circuits in holding that a Chapter 7 debtor has or may have a previously described "fourth" option or "right".[12] *Boodrow*, 126 F.3d 43 (2nd Cir. 1997); *Home Owners Funding Corporation of America v. Belanger (In re Belanger)*, 962 F.2d 345 (4th Cir. 1992); and *Parker*, 139 F.3d 668 (9th Cir. 1998).

These courts have offered a variety of rationales for their qualified holdings. Representative of them are those found in the Second Circuit's *Boodrow* decision. There, shadowed by a strongly-worded dissenting opinion, 126 F.3d at 53 (Shadur, J., dissenting) (a dissenting opinion that would later largely be adopted by the First Circuit in *Burr*), the *Boodrow* majority qualified its ruling by holding that it would only be a Chapter 7 debtor who is "current" in his payments at the time of the bankruptcy filing who

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[11] In addition to the phrase "actual prejudice" nowhere appearing in §521(2), one would think, given Congress' use of the imperative word "shall" twice in §521(2) in describing the "Debtor's Duties" – the debtor "shall" specify an intention, and the debtor "shall" perform that intention – and a *third* time in §704(3) ("The trustee shall . . . ensure that the debtor shall perform his intention as specified in §521(2)(B)"), that the burden of showing "actual prejudice", or anything else sufficient to excuse the debtor from performing his duties under §521(2), would be imposed *not* on the creditor but on the debtor.

[12] This option is elevated to the stature of a "right" by the Ninth Circuit in *Parker* and by the Second Circuit in *Boodrow*, referred to there as a right of "reinstatement", 126 F.3d at 49. The secured creditor's rights under a *Boodrow* "reinstatement", however, are hardly reinstated to what they were before the bankruptcy filing (when they included recourse against the debtor), but are materially diminished given that the debtor's discharge eliminates entirely the creditor's important pre-bankruptcy right of recourse.

would be excused from the literal mandate of §521(2)(B), while one who was not "current" would indeed be limited to the retention options expressed in that statute – a distinction nowhere evident in the statute and one criticized as illogically prejudicing the creditor whose debtor happens to be current on the bankruptcy filing date.[13] The Fourth Circuit in *Belanger* seems to have earlier adopted this "required to be current" qualification, as well. ("A debtor who is not in default may elect to retain the property and make the payments. . . . ") 962 F.2d at 347.

The most prevalent of the rationales offered by these circuits for rejecting the *per se* rule Congress apparently provided are: i) a perceived ambiguity or discretion introduced through the "if applicable" phrase in §521(2)(A); ii) the purported self-contradiction found in §521(2)(C); and iii) that §521(2) is only a "procedural" statute. Each is briefly discussed below.

A. The "If Applicable" Contentions

Section 521(2) (App. 122) is laid out in logical fashion, sensibly proceeding from the *general* to the *specific*, with the "if applicable" phrase effecting that transition from the general to the specific. "If applicable" appears immediately after the phrase "retention or surrender of such property" in §521(2)(A) and just before the listing of the specific

[13] *See* Waxman, Ned W., *Redemption or Reaffirmation: The Debtor's Exclusive Means of Retaining Possession of Collateral in Chapter 7*, U. Pitt. L.R., Vol. 56, No. 1, at 202 (Fall 1994). There the author points out that such a distinction effectively penalizes the secured creditor whose debtor happens to be current by permitting that debtor to, for example, avoid reaffirmation and thereby effectively transform the debt from a recourse into a non-recourse obligation; while, conversely, a debtor who is not current on the petition date would likely have to reaffirm in order to retain the collateral and would thereby continue to have personal liability to his creditor, just as when the loan was made.

retention options of redemption and reaffirmation. The *per se* rule courts find that "if applicable" is given its natural and sensible reading when it is understood first to refer (given its juxtaposition to the words "retention or surrender") to the general threshold determination of whether there will be a "retention or surrender" of the property in question, with, thereafter, the more specific requirement of specifying the *method of retention* – redemption or reaffirmation – logically, only "applicable" if there is to be a *retention* of the property, and obviously not "applicable" if there will be a *surrender* of it. *Burr*, 160 F.3d at 846-47. See also *In re Taylor*, 3 F.3d 1512, 1516 (11th Cir. 1993) (similarly discussing this sensible role served by "if applicable").

By contrast, the construction given "if applicable" by *Parker*, 139 F.3d at 673, and other "fourth option" circuits is odd and appears to be indefensible:

> Our interpretation of that language is that the only mandatory act is the filing of the statement of intention, which the debtor "shall" file. Then, "if applicable" – that is, if the debtor plans to choose any of the three options listed later in the statute (claiming the property as exempt, redeeming the property, or reaffirming the debt) – the debtor must so specify in the statement of intention.

Parker seems to debase "if applicable" down to meaning "If the debtor feels like it", a construction out of character with the tenor of this imperatively-worded statute imposing seemingly mandatory duties upon debtors. "If applicable", as construed by *Parker*, introduces a supervening element of unilateral debtor discretion under which the debtor can choose to do something or not choose to do something, or may do nothing at all. That construction cannot be squared with the clear thrust of the statute that certain "duties" are being imposed on debtors that they "shall perform." As the First Circuit observed in *Burr*:

> . . . . a reading of the 'if applicable' phrase to connote the existence of an unexpressed 'fourth option' demands an inordinately awkward use of the statutory language.
>
> * * *
>
> By contrast, it is perfectly conventional usage – and perfectly good English – for someone to employ the 'if applicable' language in the statute as a shorthand way of calling for choice between A and B and, only if B is 'applicable,' then a further choice among subsets of B.

160 F.3d at 847 (quoting *In re Boodrow*, 126 F.3d at 57-59 (2nd Cir. 1997) (Shadur, J. dissenting).

Burr goes on to observe that judicially creating a "fourth option" makes a mockery of the reaffirmation option set forth by Congress in §521(2), since almost no Chapter 7 debtor, given such a choice, would ever select the reaffirmation option (through which personal liability and recourse are maintained) over that of a "retain-and-keep-current" option (through which such liability, recourse and overall responsibility are eliminated), asking, rhetorically: "Why, then, would Congress specify the seldom-to-be-used devices of redemption and reaffirmation, but leave unspecified the option that would be almost universally employed?" 160 F.3d at 848.

B. The §521(2)(C) Contentions

Parker also maintains that support for its finding of a "fourth option" may be found within §521(2)(C), or that its language at least excuses a debtor from performing as §521(2)(B) would appear to mandate. This contention originates out of reasoning first expressed by Bankruptcy Judge James Queenan in his 1996 decision, *In re Ogando*, 203 B.R. 14 (Bankr. D. Mass. 1996). *Ogando's* analysis of §521(2)(C) was soon adopted in *In re Mayton*, 208 B.R. 61,

65-66 (9th Cir. BAP 1997), with the *Mayton* court's relevant quote from *Ogando*, through which it embraced its reasoning, in turn, being taken in and recited *verbatim* by the Ninth Circuit in *Parker*. Shortly after having been accepted without apparent discernment in *Parker*, that reasoning, however, was conclusively shown to be "circular" and was discredited and rejected two years after it first appeared by the First Circuit in *Burr*, where the bankruptcy court decision it ultimately reversed was from Bankruptcy Judge Queenan. *Burr*, 160 B.R. at 845 ("This order . . . was consistent with Judge Queenan's published opinion in *In re Ogando*").

Section 521(2)(C) provides:

> (C) Nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property *under this title* (emphasis added)

Subparagraphs (A) and (B) of §521(2) provide, respectively, that the debtor shall specify whether he intends to retain or surrender the property in question, and then shall perform either a surrender or one of the enumerated retention options.

In *Parker*, the Ninth Circuit adopts this verbatim passage from *Ogando*, 203 B.R. at 16:

> Subparagraph (C) states: "nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee rights with regard to such property under this title." . . . A debtor otherwise may retain the collateral and continue to make the contract payments or go into default and risk foreclosure. Amazingly, courts restricting the debtor to redemption or reaffirmation refer not at all to subparagraph (C). Yet its meaning is plain, especially in light of its location in a statute whose other paragraphs all relate to procedure and not substance.

Parker, 139 F.3d at 673. In commenting on the quoted language of what a debtor "otherwise may" do, *Ogando* and *Parker* ignore the telling phrase "under this title" (Title 11 of the U.S. Code – the Bankruptcy Code). The central inquiry in *Ogando* and *Parker* was whether a Chapter 7 debtor has a right to discharge his obligations to a secured creditor and continue to retain its collateral without performing a statutorily specified retention option. Subparagraph (C) would be implicated only if that were a right that could be shown to exist under the Bankruptcy Code ("under this title"). Outside of bankruptcy (where there is no discharge), one certainly has a state law right[14] to retain collateral simply by continuing payments. The flaw in *Ogando* and *Parker* is in first *presupposing* the existence of a Bankruptcy Code right whose existence or not is the *very point* of the inquiry. Those courts, without identifying where such a retention right may be found within the Bankruptcy Code (indeed, it nowhere exists), presume its existence and then buttress their circular reasoning by concluding: "And, alas, §521(2)(C) says that this 'right' cannot be altered."

Section 521(2)(C) is logically placed at the end of §521(2) because it is simply a reconciling provision, reconciling intersecting statutory "traffic". But for §521(2)(C), there could be disputes in settings different from those here over what could be conflicting rights in the property at issue. Section 521(2)(C) resolves such potential conflicts by providing that rights found elsewhere in the Code in respect to the same property may not be altered by and shall be paramount over a debtor performing as mandated in §521(2)(A) and (B). In doing so, it nowhere gives rise to a new retention "right". As the First Circuit noted:

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[14] *Burr* notes that in this context, "the loss of such state law rights is one of the costs of a chapter 7 discharge. 160 F.3d at 848.

> Section 521(2)(C) merely acts to make supreme over the directives of §521(2)(A) and (B) rights conferred upon the debtor and trustee *elsewhere in the Bankruptcy Code*. (emphasis in original).

Burr, 160 F.3d at 848. As the court there observed, "When this is properly understood, any appearance of self-contradiction evaporates." *Id.*

C. The §521(2) Is Merely a "Procedural" Statute Contention

Misconstruing both "if applicable" and the limited role served by subparagraph (C) of §521(2), the peculiar conclusion of *Parker* and *Boodrow* is that a debtor need perform *nothing*. They hold that only one subparagraph of §521(2) is truly mandatory, §521(2)(A), requiring that the debtor file a statement of his intention, but that the phraseology investing that provision with its mandatory characteristic, use of the word "shall", fails to similarly animate the immediately succeeding and identically-phrased subparagraph, §521(2)(B), that concerning the performing of the specified intention. Such "fourth option" courts find, therefore, that §521(2) is thus only a "procedural" or "notice" statute, concluding that while a debtor must indeed specify an intention to perform something, he is free thereafter not to perform what he has specified, and in fact, may choose to perform nothing.

Lost in this denuding of §521(2) is the revealing contradiction of what *Parker* and the Second Circuit majority in *Boodrow* insist is only a "procedural" statute giving rise to a new substantive right – its newly minted "right" of "reinstatement" – for debtors. *Boodrow*, 126 F.3d at 49. These "fourth option" courts also ignore the fact that were §521(2) only a "procedural" statute, with its function solely to give notice to a secured creditor of the debtor's intentions, it would make an utter redundancy out of Bankruptcy Rule 1007(b)(2), which provides:

> A *copy* of the *statement of intention* [under Bankruptcy Code §521(2)] shall be served on the trustee and the creditors named in the statement on or before the filing of the statement. (emphasis added)

It is this Bankruptcy Rule, never mentioned by such courts, that does what a rule (as distinct from Code provisions, which *are* designed to set forth substantive law) is supposed to do – direct that notice of the intention be furnished.

Ignored by them, too, is Bankruptcy Code §704(3), which, though enacted in 1984 as part of the same act that put §521(2) into the Bankruptcy Code, and an obvious corollary to it, has been overlooked by such courts. Section 704(3) provides:

> §704 Duties of Trustee The Trustee *shall* –
>
> (3) ensure that the debtor *shall perform* his intention as specified in Section 521(2)(B) of this title . . . (emphasis added).

Section 704(3) would appear to end the debate and be conclusive evidence that Congress intended that a Chapter 7 debtor actually *perform* the stated intention, not merely specify or give notice of it. Indeed, as to the performance requirement, the word "shall", collectively, is used four times in §§ 521(2) and 704(3), and it would be difficult to imagine Congress' message being more emphatic that the debtor "shall perform."

In regard to what had been another recurring consumer bankruptcy issue (valuation of vehicles in Chapter 13 cases – who number far less than Chapter 7 cases),[15] this Court held that a "simple rule . . . is needed . . . to

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[15] In 2002, nationwide there were 1,103,029 individual Chapter 7 cases as compared to 454,293 Chapter 13 cases. Statistics compiled by Admin. Office U.S. Cts.

serve the interests of predictability and uniformity." *Associates Commercial v. Rash,* 520 U.S. 953, 117 S. Ct. 1879, 1886, 138 L.Ed.2d 148 (1997). This divisive conflict likewise needs to be resolved in favor of "predictability and uniformity".

II. The Judicial Creation of a "Fourth Option" Retention "Right" Has Upset Congress' Balancing of Duties and Entitlements Between Debtors and Creditors, Needlessly Introduced Uncertainty and Resulting Second Tier Conflict and Litigation, and Both Nullified Rights and Interests Provided Elsewhere and Undercut Precedent Established By This Court

"Fourth option" courts that overlay this unexpressed retention onto the Bankruptcy Code have created an untenable post-bankruptcy environment for secured creditors – one in which the certainty of court-supervised reaffirmation agreements are routinely eschewed, forbearance and other agreements are readily susceptible to being voided, and creditors are placed on tenterhooks in their post-bankruptcy contacts with their debtors-borrowers.

Reaffirmation of the debt or redemption or surrender of the collateral each produce, as Congress intended, a known and certain result and ensuing relationship for a Chapter 7 debtor and his secured creditor. With a reaffirmation, the debtor's personal liability for the debt is maintained[16] as it was at the inception of the loan when the creditor, as a condition to allowing the debtor-borrower to retain its collateral, insisted that it have recourse

[16] A reaffirmation on the same terms that existed pre-bankruptcy (which will typically be the case in those jurisdictions that apply the *per se* rule, *Burr,* 160 F.3d at 848) in no sense improves the creditor's position but merely maintains it in the manner as existed pre-bankruptcy.

against the borrower. With a redemption, the creditor receives in a lump sum[17] the value of its collateral. And, of course, in the absence of a reaffirmation or redemption, the collateral would be surrendered to the secured creditor.[18]

In contrast, under a "fourth option" the secured creditor, at once, retains or receives neither any measure of continuing personal liability or recourse against its debtor-borrower, nor its collateral, nor its value.

The fallout from this judicially facilitated "fourth option" has been damaging and far-reaching.

A. Practical Nullification of Reaffirmation Agreements

The only post-bankruptcy agreement in which the otherwise dischargeable debt is permitted to furnish the consideration is a reaffirmation agreement. Such an agreement must comply with the stringent requirements (disclosures and other protections intended for the benefit of the debtor) set forth in Bankruptcy Code §524(c), and is required to be filed with and often also must be separately reviewed and approved by the bankruptcy court. It is unrealistic to think that creditors and their debtors who retain secured collateral post-discharge won't have continuing contact, dealings and communications with one another. *See In re Ramirez*, 273 B.R. 620, 624 (Bankr. C.D. Cal. 2002) (so observing in class action proceeding alleging

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[17] *See In re Bell*, 700 F.2d 1053, 1056-58 (6th Cir. 1983) (redemption is effected by debtor paying secured creditor the value of its collateral in a lump sum).

[18] The First Circuit in *Burr* recognized that most Chapter 7 debtors could not afford to redeem and would likely have to enter into reaffirmation agreements rather than surrendering the collateral. 160 F.3d at 848.

creditor's issuance of post-discharge notices to un-reaffirming borrowers violated the discharge injunction). It is ironic that in their well-intentioned zeal to confer a more favorable retention right on debtors than Congress provided, *Parker* and other "fourth option" circuits have created an environment in which the very court-supervised agreement that would conclusively define the ongoing debtor-secured creditor relationship and provide the greatest protection and certainty is routinely eschewed and has, as a practical matter, been effectively eradicated in such circuits. Here, for example, BRM would have preferred to have entered into a reaffirmation agreement and would have welcomed any court review of that, but the Debtors predictably rebuffed its entreaties to do so. Oddly, what regularly results then in such circuits is, somewhat perversely, a *judicially inspired* post-discharge void – one in which there is no controlling agreement, and, given the attendant uncertainty, instead a fertile breeding ground for conflict, dispute and litigation.

B. Imperceptibly Passing Into A Prohibited In Personam Realm

Following discharge, the creditor's right to pursue the debtor for his "personal liability" for the debt is extinguished. Bankruptcy Code §524(a)(1). Further, upon discharge a "discharge injunction" comes into effect, §524(a)(2), which *enjoins* any act to collect or recover the debt "as a personal liability of the debtor." While such *in personam* rights are extinguished, however, it is well established, as this Court has held, that a secured creditor's *in rem* rights in its collateral survive and pass through the bankruptcy case unaffected by that "personal liability" discharge.[19] The extent to which these surviving

[19] *See* note 6.

in rem rights may be exercised, however, remains defined by the amount of the discharged debt (which, itself, is not extinguished),[20] since even post-discharge a secured creditor, in realizing upon its *in rem* rights, may not be paid more than the amount of the debt.

The post-discharge relationship and continuing interaction between a "fourth option" debtor and his secured creditor is thus plagued by the uncertainty of this awkward situation where personal liability for the debt is extinguished, but *in rem* rights, exercisable to the extent of the then discharged debt, survive. The creditor's focus and actions must be confined exclusively to realizing only upon its *in rem* rights, and in doing so it may never cross an often imperceptible line where it may be viewed as attempting to be paid from the debtor personally, thereby violating the discharge injunction.

Creditors in such a tentative relationship are therefore required, for example, to reconfigure their recovery and collection systems[21] to accommodate this class of debtor-borrowers who have not reaffirmed the debt but nonetheless wish to continue to pay[22] on the obligation so that they may retain the collateral. No letters, notices or other written or oral communications may be issued to this class of debtors that state or imply that they "owe" a debt, or that might otherwise be viewed as violating the discharge injunction. This uneasy arrangement has

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[20] *See* note 6.

[21] *See In re Garske*, 287 B.R. 537, 539 n. 3 (9th Cir. BAP 2003) (commenting on how creditor was required to establish an entirely new "retained collections unit" "in response to the growing number of its customers who had received a chapter 7 discharge while retaining possession of their vehicles without reaffirming the underlying debt or redeeming the vehicle.").

[22] Bankruptcy Code §524(f) provides that a debtor may voluntarily repay a discharged debt.

needlessly engendered an embarrassing high volume of nettlesome litigation over whether that line has been crossed, just as one court that rejected such a retention "right" had predicted.[23]

Regrettably, this "fourth option" has supported a "cottage industry" of attorneys eager to pounce on the slightest perceived violation of the discharge injunction or other transgression by a creditor. Indeed, it is almost poignant that in just such a case, *In re Garske*, 287 B.R. 537, 546 (9th Cir. BAP 2003) (class action against creditor alleging discharge injunction violations arising from phone calls made to un-reaffirming debtors), the very bankruptcy judge who presided in *Parker* himself acknowledged that "trouble is bound to ensue" from this "neither fish nor fowl" relationship and that, having introduced the *Parker* retention "right" that was at the root of such recurring disputes, he was "in the position of having to skin my own skunk".

C. Susceptibility of Forbearance and Other Agreements

The "fourth option" retention "right" has also had the effect of derogating the long held rule that surviving *in rem* rights furnish independent consideration for post-bankruptcy forbearance agreements, such as the PDPRA. *See In re Heirholzer*, 170 B.R. 938, 940-41 (Bankr. N.D. Ohio 1994) (decision to forego foreclosure represents sufficient consideration to support a binding post-discharge obligation).

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[23] *See In re Lock*, 243 B.R. 332, 334-35 (Bankr. S.D. Ohio 1999) (referring to the "absurd conclusion" in *Parker* and presciently commenting on how "The confusing status that results from such an undefined relationship is not beneficial to either the debtor or the creditor and *would undoubtedly result in litigation.*") (emphasis added).

The Ninth Circuit chose not to address the point emphasized by BRM that where the Property (in respect to which BRM's *in rem* rights survived post-discharge) had a value in excess of the amount of the then discharged debt, there would, of necessity, be an equivalence between the amount to be paid through the PDPRA and the discharged debt. The consideration for the PDPRA was BRM's surviving *in rem* rights, but the expressed and realizable value of those rights could not exceed, and thus was in the PDPRA capped at, the amount of the then discharged debt.

Compelled to follow *Parker's* pronouncement of a pre-existing retention "right", the Ninth Circuit panel's knee-jerk reaction was to conclude that there was no new consideration supporting the PDPRA, and given this and that the amount expressed in the PDPRA was the same or roughly equivalent to the amount of the discharged debt, the consideration for the PDPRA was the *discharged debt*, and it was therefore declared unenforceable. BRM could hardly have been clearer that the PDPRA was not and was never intended to be a reaffirmation agreement but one the consideration for which was its surviving *in rem* rights. The Ninth Circuit panel, unable to rationalize the enforceability of the PDPRA against the defective construct of *Parker*, which it was bound to follow, resorted to creating a "straw man" premise that the PDPRA was an attempted reaffirmation agreement, and invalidated it.

Parker, in compelling the recognition of a pre-existing retention "right" in favor of Chapter 7 debtors, effectively vitiates the long held acceptance of the capacity of *in rem* rights to furnish consideration. Because of this and its blurring of the distinction this Court established between *in personam* and *in rem* rights, following *Lopez* virtually every post-discharge forbearance agreement between a debtor-borrower and his secured creditor in the Ninth Circuit is susceptible to being declared unenforceable. Following *Lopez*, secured creditors are well advised not to attempt to accommodate later defaulting debtors wishing

to retain their collateral but simply, in all cases and without discussion, proceed to exercise their repossession rights.

D. Invalidating Heretofore Validity of Default Upon Filing Clauses

Finally, the effect of *Parker*, the Second Circuit in *Boodrow*, and other "fourth option" courts has also been to effectively nullify Congress' long-standing and carefully-crafted treatment in the Bankruptcy Code of so-called "default upon [bankruptcy] filing" clauses, which are found in the overwhelming majority[24] of secured consumer credit contracts. The reason those clauses are standard in such contracts is so that a creditor, in the event of a bankruptcy filing and resulting discharge, will be able to exercise its *in rem* rights rather than have to continue on in a non-recourse relationship – the very relationship that *Parker* now imposes.

Congress has dealt with default upon filing clauses carefully and with precision in five separate Bankruptcy Code sections. *In re Schweitzer*, 19 B.R. 860, 867 (Bankr. E.D. N.Y. 1982) (listing these provisions). In commenting on how default upon filing clauses are neither void nor nullified in general but are merely conditionally inapplicable during the pendency of the bankruptcy case, and fully enforceable following its closing and the cessation of the bankruptcy estate, the *Schweitzer* court commented:

> Accordingly, where as here the asset is no longer part of the bankruptcy estate, it follows that the Section 541(c) prohibition against such bankruptcy termination clauses is no longer

[24] The First Circuit in *Burr*, 160 F.3d 843, 848 (1st Cir. 1998), noted that it would be an "extraordinarily rare" circumstance where a default upon filing clause would not be found in a consumer loan contact. *See also, In re Sparago*, 31 B.R. 552, 554 (Bankr. E.D. N.Y. 1983) ("Such a [default upon filing] clause is to be found in all or virtually all vehicle sales contracts.").

> operative. Ergo, in the absence of a specific Code provision, unless such clauses can be said to be offensive to the underlying goals and purposes of the Code (i.e., against public policy), they must be enforced.

Schweitzer, 19 B.R. at 867. *See also*, *In re Bell*, 700 F.2d at 1054 default upon filing clause remains enforceable against debtor who eschews reaffirmation or redemption); and *In re Forlini*, 200 B.R. 9, 12 (D.R.I. 1996) ("this Court is unable to find any Code provision that expressly authorizes the Bankruptcy Court to enjoin *post* bankruptcy enforcement of default upon filing clauses.").

Parker and *Boodrow's* distending of one Code provision, §521(2), has thus effectively nullified others. Indeed, although *Boodrow*, for example, aside from a passing footnoted reference,[25] never squarely addresses how its ruling might impact the enforceability of default upon filing clauses, the effect of its "reinstatement" right has unquestionably been to "elbow-out of the way" Congress' carefully-crafted treatment of them. This is demonstrated in *In re Sokolowski*, 227 B.R. 16 (Bankr. D.Conn. 1998), in which the United States Bankruptcy Court for the District of Connecticut held that *Boodrow* mandated that the creditor there be enjoined from proceeding to enforce (even after the close of the bankruptcy case) the default upon filing clause in its contract with its Chapter 7 debtor: "The court believes that . . . *Boodrow* is precedential and mandates the result, even though the present issue was not specifically addressed by the *Boodrow* court."

It is noteworthy that prior to *Boodrow* at least two bankruptcy courts within its circuit had specifically upheld the enforceability of default upon filing clauses. *Schweitzer*, 19 B.R. 860, (Bankr. E.D. N.Y. 1982) and *In re*

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[25] 126 F.3d at 49, n.6.

Sparago, 31 B.R. 552 (Bankr. E.D. N.Y. 1983) (each permitting post-bankruptcy enforcement of default upon filing clauses against non-reaffirming Chapter 7 debtors). A further fallout from *Parker* and *Boodrow's* interpretation of §521(2), therefore, has been their scuttling of Congress' long-standing and carefully crafted treatment of such important clauses.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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345 F.3d 701

United States Court of Appeals,
Ninth Circuit.

In re Charles LOPEZ; In re Julie Lopez, Debtors,
Bankruptcy Receivables Management, Appellant,
v.
Charles Lopez; Julie Lopez, Appellees.

No. 02-15774BAP.

Argued and Submitted May 14, 2003.
Filed Sept. 26, 2003.

Matthew J. McGowan, Salter McGowan Sylvia & Leonard, Inc., Providence, Rhode Island; and Richard W. Snyder, Law Office of Richard W. Snyder, Tustin, California, for the appellant.

John R. Roberts, John R. Roberts, A Professional Corp., Placerville, California, for the appellees.

John Rao, National Consumer Law Center, Boston, Massachusetts; and Norma L. Hammes & James J. Gold, San Jose, California, for Amicus Curiae National Association of Consumer Bankruptcy Attorneys.

Appeal from the Ninth Circuit, Bankruptcy Appellate Panel; Montali, Ryan and Hollowell, Bankruptcy Judges, Presiding.

Before HUG, GIBSON,* and FISHER, Circuit Judges.

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* The Honorable John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

OPINION

HUG, Circuit Judge:

This case addresses the question of whether a creditor may enforce a post-bankruptcy discharge agreement entered into with a debtor retaining the collateral pursuant to its rights under *McClellan Fed. Credit Union v. Parker (In re Parker),* 139 F.3d 668 (9th Cir.1998). Creditor Bankruptcy Receivables Management ("BRM") seeks to enforce such an agreement on the grounds that it offered the debtors, Charles and Julia Lopez, new consideration in the form of waiving its right of replevin. The Bankruptcy Appellate Panel ("BAP") held that the agreement was an invalid reaffirmation agreement pursuant to Bankruptcy Code 11 U.S.C. § 524 because the consideration was based in part on the Lopezes' discharged debt. The BAP also rescinded the agreement under California law as having been executed under mistake of law. BRM appeals.

I

Charles and Julia Lopez bought a diamond ring and jewelry. The seller, Samuels Jewelers, Inc., financed the purchase of $5,623.01 and took a security interest in the jewelry.

Thereafter, the Lopezes filed a Chapter 7 bankruptcy petition. The Lopezes stated their intention to reaffirm their debt to Samuels. During the pendency of the case, Samuels assigned its rights in the jewelry to BRM. BRM subsequently sent a reaffirmation agreement to the Lopezes' attorney, who forwarded the proposed reaffirmation agreement to the Lopezes and counseled against

reaffirmation. The Lopezes did not execute the reaffirmation agreement.

After the Lopezes received their bankruptcy discharge, Shannon Vinciguerra, a legal assistant employed by BRM, sent a letter to the Lopezes' attorney, American Law Center. The letter demanded the return of the jewelry, or alternatively, offered the Lopezes the option of retaining the jewelry if they paid a lump sum redemption or executed a post-discharge retention agreement. The agreement accompanied the letter. The terms of the retention agreement provided that the Lopezes could retain the jewelry if they paid the remaining balance of the debt in monthly installments with interest. Vinciguerra's letter warned that if counsel did not respond within 10 days, BRM would assume that it was no longer representing the Lopezes.

American Law Center was no longer representing the Lopezes. Counsel claims to have forwarded the letter to the Lopezes, but they claim to have never received the letter. The bankruptcy court found that the Lopezes never received the letter from American Law Center.

BRM next contacted the Lopezes directly. It sent the Lopezes a second post-discharge agreement, providing that BRM would forbear from repossessing the jewelry if the Lopezes would agree to make payments to BRM. The terms of the agreement mirrored the original contract. Under the agreement, the Lopezes would be obligated to pay the entire remaining contract debt, totaling $3030.35, plus interest at the contract rate of 22.8% per annum, payable in $100 monthly installments.

Vinciguerra telephoned the Lopezes concerning the second agreement. The bankruptcy court found that

Vinciguerra or another agent of BRM told Mr. Lopez that he and his wife were required to sign the second agreement and return it to BRM immediately. The court also found that Vinciguerra did not discuss any other options with Mr. Lopez, did not explain that he had the right to simply return the jewelry, did not explain the terms of the second agreement, and did not suggest that they seek the advice of counsel.

The Lopezes signed the second agreement, altered the terms by reducing the monthly payment from $100 to $85, and returned it to BRM. They made one payment to BRM of $85. They also submitted a payment of $170, but stopped payment on the check before it was presented for payment by BRM. The bankruptcy court found that the Lopezes attempted to return the jewelry but BRM would not accept it.

BRM threatened to sue the Lopezes. In response, they reopened their bankruptcy case and filed a complaint against BRM. The original complaint included causes of action for violation of the discharge injunction, fraud, undue influence, and malice. BRM filed a counterclaim for breach of the second agreement, seeking declaratory relief, attorney's fees, and conversion. BRM asserted the second agreement was a valid contract, and that the Lopezes breached by failing to make payments.

BRM moved for summary judgment, which the bankruptcy court granted in part and denied in part. The court agreed that the Lopezes had no private right of action for damages arising from a violation of the discharge injunction. The court found, however, implicit in the Lopezes' claim for declaratory relief and damages, a request holding

that the second agreement was an unenforceable reaffirmation agreement. The court also construed the complaint to include a request that the agreement was unenforceable.

The bankruptcy court ruled in its summary judgment order that the second agreement was not a valid reaffirmation agreement because it was not made before the court entered the Lopezes' discharge, as required by 11 U.S.C. § 524(c). It further concluded that the second agreement was not a valid redemption agreement pursuant to 11 U.S.C. § 722 because it was not approved by the court in accordance with Rule 6008 of the Federal Rules of Bankruptcy Procedure. The court indicated the agreement might be a valid post-petition agreement supported by new consideration, but found that a genuine issue of material fact existed as to whether BRM gave the Lopezes adequate consideration for the new contract.

After conducting a trial, the bankruptcy court ruled that BRM and the Lopezes did not form a new contract because the Lopezes were under the misapprehension that they had no alternative but to execute the second agreement. The court concluded that, pursuant to California law, the Lopezes did not freely consent, and such a mistake of law warranted rescission of the agreement.

Alternatively, the court held that the agreement was invalid because it was not supported by new consideration. Relying upon *Parker,* the court ruled that the Lopezes had the right to retain the jewelry and continue making payments without reaffirming the original contract. BRM's forbearance from foreclosing on the jewelry merely acquiesced to what *Parker* already allows – namely the debtor may retain the jewelry and keep current its payments

pursuant to the original contract, and the creditor retains the right to foreclose should the debtor default. The reduction of the monthly installment by $15 was too insignificant to suffice as additional consideration.

The court rescinded the agreement, ordered BRM to refund the $85 payment to the Lopezes, and ordered the Lopezes to return the jewelry to BRM (or more appropriately, ordered BRM to accept the jewelry from them, something the Lopezes wished to do before the action commenced).

A Ninth Circuit Bankruptcy Appellate Panel ("BAP") affirmed. *Bankruptcy Receivables Mgmt. v. Lopez (In re Lopez),* 274 B.R. 854, 856 (9th Cir. BAP 2002). The BAP held that the agreement was an invalid reaffirmation agreement for its failure to comply with § 524(c). *Id.* at 860.

Next, the BAP held that the bankruptcy court did not err when it determined that the Lopezes' complaint contained an implicit cause of action for declaratory relief. *Id.* at 862. BRM raised the validity of the agreement in its counterclaim, seeking a declaration that the contract was enforceable. *Id.* Also, the Lopezes' failure to expressly request declaratory relief did not constitute a waiver because Federal Rule of Civil Procedure 8(f) requires courts to construe pleadings "to do substantial justice," and BRM had notice from the complaint that the validity of the agreement was disputed. *Id.* Finally, BRM consented to trying the issue as amended by the bankruptcy court's post-summary judgment under Federal Rule of Civil Procedure Rule 15(b), providing that the issues tried by the express or implied consent of the parties are to be

treated as if they had been raised in the pleadings. *Id.* at 862-63.

Finally, the BAP held that the bankruptcy court properly determined that the Lopezes were entitled to rescind the agreement. *Id.* at 864. The Lopezes' failure to plead mistake or request recision did not preclude the relief because the sole issue of the trial, raised by both BRM and the Lopezes, was the validity of the contract. *Id.* at 865. The court did not clearly err in finding that BRM improperly induced the Lopezes into signing the agreement. *Id.* at 866. The court also properly applied California Civil Code § 1691 because the Lopezes' offer to stop making payments and return the jewelry satisfied the notice and restore requirements of § 1691. *Id.* at 867.

Jurisdiction before this court is proper under 28 U.S.C. § 158(d).

II

Decisions of the BAP are reviewed de novo. *Carillo v. Su (In re Su),* 290 F.3d 1140, 1142 (9th Cir. 2002). This court reviews the bankruptcy court's conclusions of law de novo and its findings of fact for clear error. *Eskanos & Adler, P.C. v. Leetien,* 309 F.3d 1210, 1213 (9th Cir.2002). The bankruptcy court's choice of remedies is reviewed for an abuse of discretion. *Stone v. San Francisco,* 968 F.2d 850, 861 (9th Cir.1992).

III

We address two issues on appeal. The first is whether the bankruptcy court impermissibly construed the complaint to include a cause of action for declaratory relief.

The second issue is whether a post-discharge agreement to pay a discharged debt must comply with Bankruptcy Code §§ 524(c) and (d)'s procedural requirements for reaffirmation agreements, or whether parties may contract around § 524 even though the consideration is based in whole or in part on a discharged debt in addition to new consideration. The BAP adopted a bright-line rule that any agreement whose consideration is based in whole or in part on a discharged debt is only enforceable if it complies with § 524. *Lopez,* 274 B.R. at 860. The $3030.35 question in this case is even though the agreement is not a valid reaffirmation agreement under § 524, is it nevertheless a valid contract?

A. The Bankruptcy Court Did Not Err in Granting Declaratory Relief to the Lopezes.

The validity of the contract is the central claim of both parties. The bankruptcy court did not abuse its discretion in construing the pleadings to obtain substantial justice. Fed.R.Civ.P. 8(f). The Lopezes had standing to seek relief from the bankruptcy court through a contempt proceeding. *Walls v. Wells Fargo Bank N.A.,* 276 F.3d 502, 507 (9th Cir.2002). Finally, BRM consented to trying the issue of the validity of the agreement as construed by the bankruptcy court. Fed.R.Civ.P. 15(b); *see also Consolidated Data Terminals v. Applied Digital Data Sys.,* 708 F.2d 385, 396 (9th Cir.1983).

B. The Contract Is An Invalid Reaffirmation Agreement.

1. *Parker* Applies And Is Binding Precedent.

BRM posits that this post-discharge freedom of contract issue could be avoided if this court were to reverse this circuit's prior decision, *In re Parker.* BRM claims that *Parker* misconstrues Bankruptcy Code § 521(2) by permitting debtors to retain the collateral and keep current their payments pursuant to the original contract.

In *Parker,* this court considered whether a bankruptcy court erred in refusing to approve an affirmation agreement between an unrepresented debtor and a credit union concerning a secured debt on his automobile. 139 F.3d at 670. The court considered a debtor's options under § 521(2) of the Bankruptcy Code. *Id.* at 672. Section 521(2)(A) states that after filing a Chapter 7 petition, a debtor with consumer debts secured by property of the estate shall file a statement of its intention to retain or surrender the property, and "if applicable," specify whether the debtor claims the property as exempt, plans to redeem the property, or intends to reaffirm the debt. *Id.*

The court held that a debtor could retain the secured property and keep its payments current without reaffirmation of the debt. *Id.* at 673. The only mandatory act required by debtors under § 521(2) is filing a statement of intention if a debtor elects to redeem, reaffirm, or claim the property as exempt. *Id.* Section 521(2)(C) kept a debtor's options available, including the right to forego entirely the affirmation or redemption options under §§ 521(2)(A) and (B). *Id.*

BRM contends that absent *Parker's* retain and keep current option, debtors wishing to retain the property

would be required by § 521(2) to reaffirm the debt during the course of the bankruptcy proceeding. BRM further asserts the analysis is fundamentally flawed and has been called into question by the First Circuit in *Bank of Boston v. Burr (In re Burr),* 160 F.3d 843, 847-48 (1st Cir.1998).

In *Parker,* we noted that the circuits were evenly split on whether redemption or reaffirmation were a debtor's only alternatives, or whether a debtor may retain the property and continue making payments without electing to reaffirm the debt. 139 F.3d at 672. This disagreement among the circuits regarding the proper construction of § 521(2)(A) continues to exist. Some have held that debtors may only reaffirm the debt, redeem the property, or retain through an exemption pursuant to 11 U.S.C. § 521(2). *See Burr,* 160 F.3d at 847-48; *Johnson v. Sun Fin. Co. (In re Johnson),* 89 F.3d 249, 251-52 (5th Cir.1996) (per curiam); *In re Edwards,* 901 F.2d 1383, 1385-87 (7th Cir.1990); and *Taylor v. AGE Fed. Credit Union (In re Taylor),* 3 F.3d 1512, 1516-17 (11th Cir.1993).

Other circuits follow the Ninth's approach, holding that debtors are not limited to these three options from § 521(2)(A), but may also retain the collateral so long as they keep the payments current under the original contract. *See Parker,* 139 F.3d at 673; *Capital Communications Fed. Credit Union v. Boodrow (In re Boodrow),* 126 F.3d 43, 53 (2d Cir.1997); *Home Owners Funding Corp. of Amer. v. Belanger (In re Belanger),* 962 F.2d 345, 347-48 (4th Cir.1992); *Lowry Fed. Credit Union v. West,* 882 F.2d 1543, 1546-47 (10th Cir.1989). The leading bankruptcy treatise has also endorsed the reasoning of *Parker.* 4 *Collier on Bankruptcy,* ¶ 521.10 (15th ed. rev.2003).

As a general rule, a three-judge panel of this court cannot reconsider or overrule the decision of a prior panel. *United States v. Gay,* 967 F.2d 322, 327 (9th Cir.1992). The reasoning or theory of *Parker* is not clearly irreconcilable with the reasoning or theory of an intervening higher authority to justify reconsideration or overruling. *Miller v. Gammie,* 335 F.3d 889, 2003 WL 21540416, 2003 U.S.App. Lexis 13720, at (9th Cir. July 9, 2003)(en banc); *see also Gay,* 967 F.2d at 327. Despite BRM's dedicating much of its argument to *Parker,* this issue is not appropriate for reconsideration.

The Lopezes were entitled under *Parker* to retain the jewelry so long as they continued to make their payments. 139 F.3d at 673. BRM retained, pursuant to *Parker,* the right to repossess the jewelry should the Lopezes breach. *Id.* at 671. BRM could not, however, hold the Lopezes personally liable for any difference between the debt and the value of the collateral. That personal liability had been discharged in the bankruptcy proceeding. Despite the Lopezes' declination from entering into a pre-discharge reaffirmation, BRM nevertheless attempted to enter into a contract with the Lopezes post-discharge in order to reimpose personal liability.

2. The Lopezes Were Entitled To The Protections Of § 524(c) Of The Bankruptcy Code Because The New Agreement Was Based "In Part" On The Discharged Debt.

Because the new agreement was based at least "in part" on the discharged debt, § 524(c) of the Bankruptcy

Code applies.[1] The purpose of this agreement was essentially to reaffirm the debt and to re-impose personal

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[1] Section 524(c) provides:

An agreement between a holder of a claim and the debtor, *the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title* [11 U.S.C. §§ 101 et seq.] is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if –

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2)(A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim; and

(B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that –

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of –

(i) an agreement of the kind specified in this subsection; and (ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such

(Continued on following page)

liability. The Lopezes had no obligation to BRM discernible in the post-discharge agreement without reference to the pre-petition loan. The consideration for the agreement was predicated in part (if not predominantly) on the discharged debt. The loan amount is identical to the pre-discharged debt. The terms, including the 22.8% interest rate, are also identical. The only difference in consideration was the reduction in monthly payments from $100 to $85, and the resulting extension of the duration of repayment. This new change, however, does not remove the contract from the protections of § 524(c). Because the consideration is based "in part" on the discharged debt, the agreement must comply with the procedural requirements of § 524(c) of the Bankruptcy Code.

This analysis also accords with Ninth Circuit precedent adopting a broad construction of the consumer protection afforded in §§ 524(c) and (d). *Renwick v. Bennett (In re Bennett),* 298 F.3d 1059, 1067-68 (9th Cir.2002). In *Bennett,* former law partners sued each other over the

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agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as –

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and (ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

11 U.S.C. § 524(c) (2003) (emphasis added).

proper interpretation of a post-discharge settlement agreement, where the parties agreed to pay a debt discharged in bankruptcy in exchange for a release of one partner's claims against the other. *Id.* at 1063. The court observed that Congress amended the Bankruptcy Code in 1978 by adding §§ 524(c) and (d) to address the problem of post-bankruptcy attempts to enforce pre-bankruptcy obligations in non-bankruptcy forums using non-bankruptcy law. *Id.* at 1066. The court held that a post-petition agreement to repay a discharged debt is not a valid reaffirmation agreement under § 524(c) if the consideration offered by the debtor is the repayment of the discharged debt. *Id.* at 1067. Since the consideration for the release was repayment of the discharged debt, the agreement amounted to an attempted reaffirmation. *Id.* The fact that one partner allegedly offered new consideration was inconsequential. *Id.* Consequently, the contract claim was barred under § 524(a). *Id.* at 1068.

BRM seeks to distinguish *Bennett,* which involved an unsecured debt, by arguing that the consideration here was not based "in part" on the discharged debt, but rather on BRM's *in rem* rights in the collateral. The same might be said of every secured reaffirmation agreement. Any creditor could claim *in rem* rights in the collateralization and thereby vitiate the protections of § 524(c).

Finally, the present situation differs from *Watson v. Shandell (In re Watson),* 192 B.R. 739, 748 (9th Cir. BAP 1996), where the BAP expressly found that the debt was not based "in whole or in part" on a discharged debt. There, a seller successfully sued in state court to collect on

a pre-petition debt over defaulted promissory notes relating to the purchase of a physical therapy business. *Id.* at 742.[2] The debtor then filed a Chapter 7 bankruptcy petition. *Id.* The bankruptcy court granted the seller relief from the automatic stay to pursue the state court action and collect the accounts receivable. *Id.* The parties settled the state court action, agreeing that the seller would dismiss the state action in exchange for the debtor's relinquishing to the seller his interests in the pre-petition accounts held by the trustee, as well as turning over all pre-petition accounts receivable. *Id.* The seller filed a second state court action after the debtor failed to turn over the accounts receivable. *Id.* The state court entered judgment in favor of the seller. *Id.* The debtor then sought to reopen his bankruptcy case, asserting that the state court award was barred under § 524(c) as an attempt to collect on a discharged debt and failed to satisfy § 524(c)'s requirements for reaffirmation agreements. *Id.* at 744. The BAP sustained the bankruptcy court's denial of the motion to reopen, concluding that because the first state proceedings were allowed to proceed, the debtor's agreement was not a reaffirmation of the debt on the original note. Instead, the BAP found that the agreement "concerned his obligation to provide collateral that had been released from the automatic stay." *Id.* at 748. Thus the settlement agreement did not constitute an improper reaffirmation agreement. By contrast, the post-discharge agreement here is based at least "in part" on the discharged debt.

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[2] The seller obtained a preliminary injunction in state court, requiring the debtor to provide information about the accounts and surrender proceeds to a trustee. *Id.* at 743.

There was no finding that the agreement was based on any similar "obligation to provide collateral that had been released from the automatic stay."

3. BRM Did Not Comport With § 524(c).

BRM's attempt to reaffirm the debt does not comport with § 524(c) of the Bankruptcy Code. The agreement was entered after the discharge of the debt, contrary to § 524(c)(1), and was not filed with the court and reviewed by Lopezes' counsel, contrary to § 524(c)(3). This agreement cannot be a valid reaffirmation agreement.

This conclusion is supported by other provisions of the Bankruptcy Code. Subject to certain exceptions, § 727 of the Bankruptcy Code discharges a debtor from all debts that arise before the date of the order for relief. *Lompa v. Price (In re Price),* 871 F.2d 97, 98 (9th Cir.1989). Section 524(a) permanently enjoins all creditor actions to collect debts discharged under § 727. *Lopez,* 274 B.R. at 860. A debtor may voluntarily make payments on a discharged debt under § 524(f), or enter into a new agreement with a creditor so long as the creditor complies with §§ 524(c) and (d)[3]. *Id.*

IV

BRM attempts to reassert personal liability on the Lopezes for a debt that has been discharged in bankruptcy. BRM's supposed consideration, forbearing its foreclosure

[3] Section 524(d) imposes judicial oversight provisions for parties not represented by counsel.

right in exchange for the repayment of the discharged debt, is hardly additional consideration because under *Parker* the Lopezes were entitled to retain the jewelry and continue to make payments. Whether or not the decrease in the amount of the monthly payments and the lengthier duration of the payment period constituted consideration is, in any case, "of no consequence." *Bennett,* 298 F.3d at 1067 ("a post-petition agreement to repay a discharged debt is not a valid affirmation agreement" even where debtor offered additional consideration) (citing *Republic Bank of Cal. v. Getzoff (In re Getzoff),* 180 B.R. 572, 574-75 (9th Cir. BAP 1995)). Because the agreement here is based "in part" on a discharged debt, it triggers scrutiny pursuant to § 524. The agreement was not "made before the granting of the discharge," pursuant to § 524(c), and therefore is unenforceable, with or without new consideration.

We have recognized that Congress adopted §§ 524(c) and (d) to address the problem, such as the one posed here, of post-discharge attempts to enforce pre-bankruptcy obligations in non-bankruptcy forums using non-bankruptcy law. *Bennett,* 298 F.3d at 1066. As the BAP noted: "If Congress wanted foxes guarding the henhouse, it would not have incorporated section 524(c) into the Bankruptcy Code." *Lopez,* 274 B.R. at 862.

The risk of the asset's depreciating does not override the mandates of the Bankruptcy Code. Just as the credit union in *Parker* faced the risk of a depreciating automobile, so too does BRM face this risk with respect to the jewelry. This is the uncertainty creditors face with all installment loans. *See Belanger,* 962 F.2d at 349 (stating that in installment loan circumstances, "the principal disadvantage to the creditor is the possibility that the

value of the collateral will be less than the balance due on the secured debt. But this is a risk in all installment loans, and presumably the creditor has structured repayment to accommodate it."). The risk against recovering any deficiency in the loan amount post-discharge is the same had the property been redeemed through the course of the bankruptcy proceedings. *See id.*

Because the agreement is invalid under federal bankruptcy law, there is no need to review the agreement pursuant to California contract law.

The bankruptcy court did not abuse its discretion in rescinding the contract, ordering the Lopezes to return the jewelry to BRM, and requiring BRM to refund the Lopezes' $85.

The ruling of the bankruptcy court is AFFIRMED.

139 F.3d 668

United States Court of Appeals,
Ninth Circuit.

In re David P. PARKER, Sr., Debtor.
McCLELLAN FEDERAL CREDIT UNION, Appellant,
v.
David P. PARKER, Sr., Appellee.

No. 96-15784.

Argued and Submitted June 11, 1997.
Decided March 17, 1998.

Larry J. Cox, Peter A. Buck, Jones, Kerr & Buck, Sacramento, California, for the appellant.

No appearance for the appellee.

Eric M. North, San Jose, California, for the amicus curiae.

Appeal from the United States Bankruptcy Appellate Panel of the Ninth Circuit. BAP No. EC-95-1828-RBMe.

Before: D.W. NELSON, BOOCHEVER, and TROTT, Circuit Judges.

BOOCHEVER, Circuit Judge:

A debtor in Chapter 7 bankruptcy entered into a reaffirmation of his debts with a credit union. The bankruptcy court refused to approve the reaffirmation agreement, and the credit union appealed. The bankruptcy appellate panel held that the credit union did not have standing, and dismissed the appeal. Because we conclude that the credit union has standing, we consider the substantive issue of law, briefed and argued by the parties,

whether 11 U.S.C. § 521(2)(A) requires a Chapter 7 bankruptcy debtor who wishes to retain property securing a debt to reaffirm the debt or redeem the property securing the debt.

FACTS

On April 28, 1995, David P. Parker, Sr., filed a Chapter 7 bankruptcy petition in the bankruptcy court for the Eastern District of California. Parker was not represented by counsel. Among other debts, he owed the McClellan Federal Credit Union (the "Credit Union") an unsecured debt of $1,986.50 on a credit card, and a secured debt of $9,977.56, with collateral of an automobile worth between $9,000 and $10,000.

Parker filed a statement of intention under 11 U.S.C. § 521, stating his desire to reaffirm his secured loan. Still unrepresented by counsel, he executed a reaffirmation agreement with the Credit Union. In the agreement, Parker reaffirmed his secured car debt in full, and reaffirmed $1,500 of the unsecured credit card debt. In consideration of his reaffirmation, the Credit Union reduced the balance of the unsecured debt from $1,986.50 to the $1,500 as reaffirmed, and reduced the monthly payment on the secured car debt from $308.73 to $280. The Credit Union also agreed that upon his discharge in the bankruptcy proceeding, Parker would be reinstated as a member in good standing at the Credit Union, and if full payment were timely made on the secured account, the Credit Union would disregard the debt in considering any future loan application. In turn, Parker agreed that his bankruptcy discharge would not affect his obligations.

Parker filed the reaffirmation agreement, and the court scheduled a hearing on the agreement under 11 U.S.C. § 524(c)(6), which provides that a reaffirmation agreement is enforceable only if:

> (6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as –
>
> (i) not imposing an undue hardship on the debtor or a dependent of the debtor; and
>
> (ii) in the best interest of the debtor.

At the hearing, the bankruptcy court stated:

> . . . I am not going to approve the reaffirmation agreement, particularly when it rolls in unsecured debt. Even if it does reduce your monthly payment by what appears to be some amount, but not a great amount. And my understanding of the law is, that as long as you keep paying for that automobile, you – that probably would mean that the [sic] original monthly rate you get to keep it. And so then it's your choice as to how you want to proceed.
>
> . . . .
>
> I am not going to approve the reaffirmation agreement. Mr. Parker, if you want to keep your car, keep paying for it. If you want to preserve good credit with McClellan Federal Credit Union, pay them the debt that was discharged. I am just not going to make you do it.

The court granted Parker a discharge, which included his Credit Union debts.

The Credit Union appealed to the Bankruptcy Appellate Panel ("BAP"), which held that the Credit Union did not have standing to bring the appeal, and dismissed it. *McClellan Fed. Credit Union v. Parker* (*In re Parker*), 193 B.R. 525 (B.A.P. 9th Cir.1996). The Credit Union appeals.

I. *Standing*

This court reviews the legal conclusions of the BAP de novo. *Alsberg v. Robertson* (*In re Alsberg*), 68 F.3d 312, 314 (9th Cir.1995), *cert. denied,* 517 U.S. 1168, 116 S.Ct. 1568, 134 L.Ed.2d 667 (1996). To have standing to appeal a decision of the bankruptcy court, an appellant must show that it is a "person aggrieved" who was "directly and adversely affected pecuniarily by an order of the bankruptcy court . . . . [The] order [must] diminish [the appellant's] property, increase [its] burdens, or detrimentally affect [its] rights." *Fondiller v. Robertson* (*In re Fondiller*), 707 F.2d 441, 442-43 (9th Cir.1983); *see Everex Sys., Inc. v. Cadtrak Corp.* (*In re CFLC, Inc.*), 89 F.3d 673, 675 (9th Cir.1996). Whether an appellant is a person aggrieved is a question of fact, which this court reviews for clear error. If, however, the district court did not make a factual finding on the issue, and the relevant facts and evidence are before this court, we may determine the issue ourselves. *See Fidelity Bank v. M.M. Group, Inc.,* 77 F.3d 880, 882 (6th Cir.1996); *Depoister v. Mary M. Holloway Found.,* 36 F.3d 582, 585 (7th Cir.1994) (where district court did not make factual finding, court of appeals may review evidence to recognize standing).

Section 521 of the Bankruptcy Code describes the individual debtor's duties in a bankruptcy case:

> (2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate –
>
> (A) within thirty days after the date of the filing of a petition under Chapter 7 of this title . . . the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;
>
> (B) within forty-five days after the filing of a notice of intent under this section . . . the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph . . . .

11 U.S.C. § 521(2). Parker elected to reaffirm his debts.

The Credit Union stood to profit from the reaffirmation agreement. By entering into the agreement, the Credit Union sought to recover the full balance of Parker's car loan should he fail to make future payments. Without the agreement, the Credit Union's only recourse in the event of missed payments was the repossession of the vehicle. At the time the agreement was executed, the vehicle was worth between $9,000 and $10,000, and the outstanding loan was $9,977.56, only $22.56 [sic] short of the highest estimated value of the car. The car was thus very likely worth less than the loan balance, and such a disparity would increase in the event that Parker failed to make payments in the future and the Credit Union repossessed the vehicle. In addition, the Credit Union would have benefitted from the agreement's provision that

Parker would pay most of his unsecured debt, which was otherwise dischargeable.

Because the bankruptcy court refused to approve the agreement, Parker was able to keep the car and continue to make payments, while the Credit Union could not hold him liable for the full amount of the debt. This essentially "forc[es] a quasi-reaffirmation upon the creditor," *Capital Communications Fed. Credit Union v. Boodrow (In re Boodrow)*, 126 F.3d 43, 47 (2d Cir.1997) (quotations omitted), *cert. denied,* 522 U.S. 1117, 118 S.Ct. 1055, 140 L.Ed.2d 118 (1998), while the debtor need not reaffirm his obligation. Without the agreement, the Credit Union also could not hold Parker liable for any of his unsecured debt. As a result, the Credit Union's rights were "detrimentally" affected when the bankruptcy court refused to approve the agreement. *See id.* (court's refusal to approve affirmation agreement constitutes harm to creditor); *In re CFLC,* 89 F.3d at 675-76 (finding injury for standing to appeal when bankruptcy court denied assignment of a particular contract to purchaser of firm's assets, when purchase contract included right to assignment).[1]

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[1] The BAP opinion assumes that the bankruptcy court denied a motion brought by Parker himself to approve the reaffirmation agreement, and that the Credit Union is therefore attempting to appeal a court order denying Parker's motion. *Parker,* 193 B.R. at 528.

The bankruptcy court, however, did not act pursuant to a motion filed by Parker. Instead, it ruled on the reaffirmation agreement because the court itself set the hearing to review whether it imposed an undue hardship on Parker or was in his best interest. The bankruptcy court concluded that under the agreement Parker gave up his rights to have the unsecured debt to the Credit Union discharged, and Parker could keep his automobile and continue to make payments without reaffirming his debt to the Credit Union. Therefore, the bankruptcy court

(Continued on following page)

We conclude that the Credit Union was an "aggrieved person" and had standing to appeal the bankruptcy court's refusal to approve the reaffirmation agreement.

II. *Alternatives for debtors under 11 U.S.C. § 521(2)*

Because we conclude that the Credit Union has standing, we review the bankruptcy court's refusal to approve the reaffirmation agreement. We are in as good a position as the BAP to review the bankruptcy court's decision, and so we review the decision independently. *Mitsui Mfrs. Bank v. Unicom Computer Corp.* (*In re Unicom Computer Corp.*), 13 F.3d 321, 323 (9th Cir.1994).

We now consider the legal issue whether the bankruptcy court erred in its conclusion regarding Parker's alternatives under § 521(2). The bankruptcy court held that even without a reaffirmation agreement, the law allowed Parker to keep the car and continue to make his monthly payments. The court reasoned that the reaffirmation agreement therefore was not in Parker's best interest under § 524(c)(6). On appeal, the Credit Union argues that because Parker could *not* simply keep his car and continue payment without a reaffirmation agreement such as the one the bankruptcy court refused to approve, the court erred in denying approval. We review the bankruptcy court's interpretation of the statute de novo. *Grey v.*

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decided that the agreement was not in Parker's best interest, and declined to approve the agreement. The Credit Union was present at the hearing and argued for the approval of the agreement. *See In re Commercial W. Fin. Corp.*, 761 F.2d 1329, 1335 (9th Cir.1985) (attendance and objection should usually be required to fulfill "person aggrieved" status).

Federated Group, Inc. (*In re Federated Group, Inc.*), 107 F.3d 730, 732 (9th Cir.1997). In this case, if the court's interpretation of the statute was correct, it clearly was within the bankruptcy court's discretion to deny approval of the reaffirmation agreement as not in Parker's best interest. Our decision therefore depends on whether the court was correct in concluding that, absent the agreement, Parker could retain the automobile as long as he continued to make the monthly payments, even though any deficiency debt was discharged.

11 U.S.C. § 521(2)(A) states that after filing a Chapter 7 petition, a debtor who has consumer debts secured by property of the estate shall file a statement of his intention to retain or surrender the property with the clerk and, "if applicable," specify that the debtor claims the property as exempt, plans to redeem the property, or intends to reaffirm the debts. The debtor must perform his expressed intention within 45 days. *Id.* § 521(2)(B). The circuits are evenly split on whether reaffirmation or redemption of nonexempt property are the debtor's only alternatives, or whether following a Chapter 7 filing, a debtor may simply hold on to the collateral securing the loan and continue making payments, without electing whether to redeem the property or reaffirm the debt.

The Second, Fourth, and Tenth circuits have held that debtors who are current on their loan payments on secured property may elect to retain the property and make the payments specified in the contracts with the creditor. *In re Boodrow,* 126 F.3d at 53; *Home Owners Funding Corp. v. Belanger* (*In re Belanger*), 962 F.2d 345, 347 (4th Cir.1992); *Lowry Fed. Credit Union v. West,* 882 F.2d 1543, 1547 (10th Cir.1989). After a thorough review of the extant case law, the Second Circuit held that the statute "appears

to serve primarily a notice function, not necessarily to restrict the substantive options available to a debtor who wishes to retain collateral securing a debt." *In re Boodrow,* 126 F.3d at 51. The Fourth Circuit concluded that the words "if applicable" mean that there are other options available to the debtor. *In re Belanger,* 962 F.2d at 348. The Tenth Circuit decided that the plain language of the statute was mandatory, but as the statute gives no power of enforcement, the bankruptcy court, in its discretion, may allow the debtor to keep possession of the property and continue to make payments: "[A]lthough we regard as mandatory the provisions of [§ 521], we do not believe those provisions make redemption or reaffirmation the exclusive means by which a bankruptcy court can allow a debtor to retain secured property." *In re Lowry,* 882 F.2d at 1547.

The Fifth, Eleventh, and Seventh circuits disagree, holding that once the debtor decides to retain rather than surrender the property, he is restricted to the "applicable" options of claiming an exemption, redeeming the property, or reaffirming the debt. *Johnson v. Sun Fin. Co.* (*In re Johnson*), 89 F.3d 249, 252 (5th Cir.1996) (per curiam); *Taylor v. AGE Fed. Credit Union* (*In re Taylor*), 3 F.3d 1512, 1516 (11th Cir.1993); *In re Edwards,* 901 F.2d 1383, 1387 (7th Cir.1990). "Permitting a debtor to retain property while keeping up installment payments without a reaffirmation of personal liability allows a debtor to force a new arrangement on a creditor." *Id.* at 1386.

This court has not yet addressed the issue. Some bankruptcy decisions in this circuit agree with the Fifth, Eleventh, and Seventh Circuits. *See, e.g., Ford Motor Credit Co. v. Polk* (*In re Polk*), 76 B.R. 148, 150 (9th Cir. BAP 1987) ("If debtors enjoyed the right to redeem by

installments at the fair market value, few would ever elect to reaffirm secured obligations under Section 524(c) since they would likely pay a higher price."); *In re Chavarria*, 117 B.R. 582, 584-85 (Bankr.D.Idaho 1990); *In re Stevens*, 85 B.R. 854, 855 (Bankr.D.Idaho 1988). A very recent decision of a divided Bankruptcy Appellate Panel of the Ninth Circuit, however, has held that § 521 does not limit the debtor's options. *Mayton v. Sears Roebuck & Co.* (*In re Mayton*), 208 B.R. 61 (9th Cir. BAP 1997) (Meyers, B.J., concurring in the result). *In re Mayton* applied § 521(2)(C) when a debtor refused to choose one of the options in the statute:

> Subparagraph (C) states: "nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title." . . . . A debtor otherwise may retain the collateral and continue to make the contract payments or go into default and risk foreclosure. Amazingly, courts restricting the debtor to redemption or reaffirmation refer not at all to subparagraph (C). Yet its meaning is plain, especially in the light of its location in a statute whose other paragraphs all relate to procedure and not substance.

Id. at 65-66. Reasoning that § 521(2)(C)'s statement that "nothing in subparagraphs (A) and (B) shall alter the debtor's . . . rights with regard to such property under this title" "preserves the debtor's property rights derived from the substantive provisions of the Code and specifically provides that subparagraphs (A) and (B) are subservient to it," (citations omitted), the court concluded that reaffirmation and redemption are "voluntary" and that § 521(2) is "essentially a notice statute." *Id.* at 66-68.

Relying on subparagraph (C), the BAP thus reached the same result as the Second, Fourth, and Tenth Circuits.

In interpreting § 521(2), we begin with the plain language of the statute. *Pennsylvania Dept. of Public Welfare v. Davenport,* 495 U.S. 552, 557-58, 110 S.Ct. 2126, 2130-31, 109 L.Ed.2d 588 (1990). We do not agree with the decisions of some of the other circuits that the language is ambiguous. The statute states that the debtor

> shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that the property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property.

11 U.S.C. § 521(2)(A). Our interpretation of that language is that the only mandatory act is the filing of the statement of intention, which the debtor "shall" file. Then, "if applicable," – that is, if the debtor plans to choose any of the three options listed later in the statute (claiming the property as exempt, redeeming the property, or reaffirming the debt) – the debtor must so specify in the statement of intention. The debtor's other options remain available, as unambiguously stated in § 521(2)(C): "[N]othing in subparagraph[ ](A) . . . shall alter the debtor's or the trustee's rights with regard to such property under this title."

We see no reason to reach beyond this plain language. The legislative history is of little assistance in interpreting the congressional intent behind § 521. See the detailed discussion of legislative history in *In re Castillo,* 209 B.R. 59, 68-71 (Bankr.W.D.Tex.1997) (no member of Congress

explained meaning of "if applicable," and scant legislative history of this section is a "less than satisfying source of information"), *rev'd, Government Employees Credit Union v. Castillo,* 213 B.R. 316 (W.D.Tex.1997) (following *Johnson*).

We conclude that Parker was not limited to reaffirmation or redemption of his debts with the Credit Union. The bankruptcy court's refusal to approve the reaffirmation agreement, as not in Parker's best interest, was thus within its discretion.

AFFIRMED.

274 B.R. 854

United States Bankruptcy Appellate Panel
of the Ninth Circuit.

In re Charles LOPEZ and Julie Lopez, Debtors.
Bankruptcy Receivables Management, Appellant,
v.
Charles Lopez and Julie Lopez, Appellees.

BAP No. EC-01-1178-MoHRy.
Bankruptcy No. 98-31825-A7.
Adversary No. 99-2726.

Argued and Submitted Jan. 24, 2002.
Filed March 12, 2002.

Richard W. Snyder, Tustin, CA, for Bankruptcy Receivables Management.

John R. Roberts, Placerville, CA, for Charles and Julie Lopez.

Before MONTALI, HOLLOWELL [1] and RYAN, Bankruptcy Judges.

OPINION

MONTALI, Bankruptcy Judge.

Bankruptcy Receivables Management ("BRM") appeals the bankruptcy court's judgment rescinding a post-discharge agreement between BRM and Charles and Julie Lopez ("Debtors" or "the Debtors"), ordering BRM to pay the Debtors $85.00, and ordering the Debtors to turn over

[1] Hon. Eileen W. Hollowell, Bankruptcy Judge for the District of Arizona, sitting by designation.

certain jewelry to BRM. We hold that the post-discharge agreement violated Bankruptcy Code section 524 [2] and was therefore invalid and unenforceable. We also hold that the Debtors were entitled to rescind the post-discharge agreement under California law. Accordingly, we affirm the bankruptcy court's rulings.

I.

FACTS

Pre-petition, Debtors purchased a diamond ring and other jewelry from Samuels Jewelers, Inc. ("Samuels") for $5,623.01. Samuels financed the purchase and took a security interest in the jewelry pursuant to a security agreement executed by Debtors.

On August 3, 1998, Debtors filed a petition under Chapter 7 of the Bankruptcy Code. In their Chapter 7 Statement of Intention – Joint Debts, Debtors declared their intention to reaffirm their debt to Samuels. During the pendency of the case, Samuels assigned its rights to BRM. BRM then sent a reaffirmation agreement to Debtors' attorney, American Law Center ("ALC"). ALC forwarded the proposed reaffirmation agreement to Debtors with a cover letter counseling against reaffirmation. Debtors did not execute the reaffirmation agreement.

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[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

Debtors received their discharge on November 5, 1998. Three months later, Shannon Vinciguerra ("Vinciguerra"), a legal assistant employed by BRM, sent a letter to ALC. The letter demanded the return of the jewelry, but also offered Debtors the option of retaining the jewelry if they paid a lump sum or if they executed a post-discharge "retention agreement" accompanying the letter. The agreement provided, among other things, that Debtors could retain the jewelry if they paid the remaining balance of the debt in monthly installments with interest. Vinciguerra's letter warned that if counsel did not respond within ten days, BRM would assume that ALC was no longer representing Debtors.

In fact, ALC was no longer representing Debtors. The bankruptcy court considered, and rejected as not credible, evidence from ALC's principal that he forwarded the letter to Debtors. Instead, the court believed Debtors, who testified that they never received the letter or the retention agreement from their former attorney.

When ALC did not answer BRM's letter, BRM contacted Debtors directly. In February 1999, BRM sent Debtors another agreement (the "second post-discharge agreement"), which provided that BRM would forebear from repossessing the jewelry if Debtors agreed to pay BRM the entire remaining contract debt, $3,030.35, plus interest at the contract rate of 22.8% per annum, all payable at the rate of $100.00 per month.

Vinciguerra telephoned Debtors concerning the jewelry and the second post- discharge agreement. According to Mr. Lopez, Vinciguerra or another BRM agent told him that he "had to sign" the second post-discharge agreement and return it immediately to BRM. Mr. Lopez

testified that BRM did not discuss any other options with him, did not explain that he had the right to simply return the jewelry, did not explain the terms of the second post-discharge agreement, and did not suggest that the Debtors seek the advice of counsel.

According to the bankruptcy court, Vinciguerra declared that she did not demand that the Debtors sign the second post-discharge agreement and further did not threaten them with legal action. She also declared that she told Debtors that they could surrender the jewelry if they chose to do so.

The bankruptcy court did not find Vinciguerra's and BRM's version of events to be credible, and determined that BRM told Debtors that they were required to sign the second post-discharge agreement.

On February 27, 1999, Debtors signed the second post-discharge agreement after altering it to reduce monthly payments to $85.00 and returned it to BRM. They made one payment of $85.00. They also made a payment of $170.00 but stopped payment on that check before it was presented for payment by BRM. The Debtors contended that they attempted to return the jewelry but BRM would not accept it.

Because BRM threatened to sue them, the Debtors reopened their bankruptcy case on November 11, 1999, and initiated the underlying adversary proceeding by filing a complaint on December 3, 1999. The complaint originally included causes of action for violation of the discharge injunction, fraud, undue influence, and malice. By order dated March 14, 2000, the bankruptcy court dismissed the second, third and fourth claims for relief. Although the order specified that Debtors could file an

amended complaint within thirty days, Debtors did not do so. As a result, Debtors' only remaining claim for relief was their first cause of action, which sought damages for violation of the discharge injunction.

On January 1, 2000, BRM filed a counterclaim for breach of the second post- discharge agreement, declaratory relief, attorney fees, and conversion. BRM asserted that the second post-discharge agreement was valid, that the Debtors breached their obligations under the second post-discharge agreement, and that Debtors refused a demand for turnover of the jewelry. Debtors' answer to BRM's counterclaim denied that the second post-discharge agreement was enforceable, denied that BRM or Samuels demanded the return of the jewelry, and denied that the jewelry had a value of $3,030.35.

On December 11, 2000, BRM filed a motion for summary judgment, which the bankruptcy court granted in part and denied in part in a written opinion dated January 9, 2001. The bankruptcy court agreed with BRM's argument that Debtors had no private right of action for damages arising from a violation of the discharge injunction and granted BRM's motion on this point. However, the court found implicit in Debtors' declaratory relief claim the contention that the second post-discharge agreement was an unenforceable reaffirmation agreement. As Debtors had no right to damages, the bankruptcy court construed the complaint as a request that the court declare the agreement to be unenforceable.

The bankruptcy court also ruled that the second post-discharge agreement was not a valid reaffirmation agreement because it was not made before the court entered Debtors' discharge. The court further concluded that the

second post-discharge agreement was not a valid redemption agreement pursuant to section 722 because it was not approved by the court in accordance with Rule 6008. The court indicated that the agreement might be a valid post-petition agreement supported by new consideration; however, the court found a genuine issue of material fact remained as to whether BRM gave Debtors adequate consideration for the agreement. The court also found a genuine issue as to whether the value of the collateral exceeded the amount Debtors agreed to pay. The court expressed concern that it might nullify the protections afforded to debtors by sections 522(c) and (d) if it enforced a contract that required a debtor to pay more than the value of a creditor's collateral for a discharged debt.

After conducting a trial, the bankruptcy court entered its Memorandum Decision and its Judgment. The court ruled that BRM and Debtors did not form a new contract because Debtors were under the misapprehension that they had no alternative but to execute the second post-discharge agreement. Because the Debtors did not freely consent to the agreement, the court found that the second post-discharge agreement was voidable under California law based on unilateral mistake and that rescission of the agreement was the proper remedy.

As an alternative ground for relief, the bankruptcy court concluded that the second post-discharge agreement was invalid because it was not supported by new consideration.

The judgment rescinded the second post-discharge agreement, ordered BRM to refund the $85.00 payment made by the Debtors, and ordered the Debtors to turn the jewelry over to BRM. BRM timely filed its notice of appeal.

II.

ISSUES

A. Whether a post-discharge agreement between a debtor and the holder of a secured claim, not in compliance with the requirements of section 524(c), can be valid or enforceable, when the consideration for the agreement is based in part on a discharged debt.

B. Whether the court erred in determining that the complaint contained an implicit cause of action for declaratory relief.

C. Whether a debtor's request that a bankruptcy court declare a post- discharge agreement between the debtor and the holder of a secured claim invalid constitutes an impermissible private right of action for violation of the discharge injunction.

D. Whether the bankruptcy court properly determined that Debtors were entitled to rescind the second post-discharge agreement under California law.

III.

STANDARD OF REVIEW

The bankruptcy court's findings of fact are reviewed for clear error, and its conclusions of law are reviewed *de novo. Harmon v. Kobrin (In re Harmon),* 250 F.3d 1240, 1245 (9th Cir.2001). The bankruptcy court's application of California law is a question of statutory construction which is reviewed *de novo. See Moen v. Hull (In re Hull),* 251 B.R. 726, 730 (9th Cir. BAP 2000) (citing *Steinberg v. Crossland Mortgage Corp. (In re Park at Dash Point, L.P.),* 985 F.2d 1008, 1010 (9th Cir.1993)).

The bankruptcy court's choice of remedies is reviewed for an abuse of discretion, since it has broad equitable remedial powers. *Goldberg v. Bank of Alex Brown (In re Goldberg),* 168 B.R. 382, 384 (9th Cir. BAP 1994) (citing *Stone v. City & County of San Francisco,* 968 F.2d 850, 861 (9th Cir.1992), *cert. denied,* 506 U.S. 1081, 113 S.Ct. 1050, 122 L.Ed.2d 358 (1993)). Under this standard, "a reviewing court cannot reverse unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Goldberg,* 168 B.R. at 384 (quoting *In re Pace,* 159 B.R. 890, 897 (9th Cir. BAP 1993)).

The panel may affirm the bankruptcy court on any grounds supported by the record. In addition, the panel may consider a legal issue not raised on appeal where the matter is one of law and further development of the factual record is not necessary. *Canino v. Bleau (In re Canino),* 185 B.R. 584, 594 (9th Cir. BAP 1995).

IV.

DISCUSSION

A. *A post-discharge agreement between a debtor and the holder of a secured claim which does not comply with the requirements of section 524(c) cannot be valid or enforceable where the consideration is based in part on a discharged debt.*

Subject to certain exceptions enumerated in section 523, section 727 discharges a debtor from all debts that have arisen before the date of the order of relief. *In re*

Price, 871 F.2d 97, 98 (9th Cir.1989).[3] Section 524(a) "permanently enjoins all creditor actions to collect debts discharged under section 727." *In re Poule,* 91 B.R. 83, 87 (9th Cir. BAP 1988).[4] A debtor may voluntarily repay a discharged debt. 11 U.S.C. § 524(f).[5] A debtor may also waive the protections of section 524(a) by entering into a new agreement with a creditor; however, "[t]he agreement will be binding only if made in compliance with Section 524(c) and (d)." *Republic Bank of Cal., N.A. v. Getzoff (In re Getzoff),* 180 B.R. 572, 574 (9th Cir. BAP 1995).

BRM does not contend that the second post-discharge agreement satisfied the requirements of section 524. Nevertheless, BRM submits the agreement is enforceable

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[3] Section 727(b) provides, in relevant part:

> Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case. . . .

[4] Section 524 provides, in relevant part:

> (a) A discharge in a case under this title –
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727 . . . of this title, whether or not discharge of such debt is waived;
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived . . . .

[5] Section 524(f) provides: "Nothing contained in [§ 524(c) or (d)] prevents a debtor from voluntarily repaying any debt."

because it gave new and valuable consideration to Debtors in exchange for their promise to pay. BRM notes that Debtors were in default under the original contract with Samuels and therefore had no right to retain the property under *McClellan Federal Credit Union v. Parker (In re Parker),* 139 F.3d 668 (9th Cir.1998). As a result, BRM contends its promise to forbear from repossessing the jewelry if the Debtors agreed to pay the remaining contract balance plus interest at the rate of 22.8% per year constituted new consideration. According to BRM, this new consideration makes the second post-discharge agreement enforceable notwithstanding section 524.

BRM's argument of new consideration misses the mark. Whether or not the Debtors received new consideration is irrelevant, because section 524(c) "is not concerned with the consideration that the debtor received." *In re Zarro,* 268 B.R. 715, 720 (Bankr.S.D.N.Y.2001). Instead, the statute provides that agreements between a debtor and a claim holder, whose consideration is based even in part on a dischargeable debt, is *only* enforceable if it complies with the applicable procedural requirements of section 524(c).[6] In other words, if the agreement does not

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[6] Section 524(c) lists requirements for obtaining a valid reaffirmation agreement.

> Reaffirmation agreements must (1) be made before the court grants the debtor's discharge, (2) contain clear and conspicuous statements advising the debtor (a) of the right to rescind the agreement and (b) that the agreement is not required by law, and (3) be filed with the court. Debtors may rescind the agreement by giving notice of rescission by the later of (a) the date the debtor receives his discharge or (b) 60 days after the agreement is filed with the court. For a debtor represented by an attorney, the attorney must file a

(Continued on following page)

comply with section 524 and any part of the consideration given by a debtor involves his or her promise to pay a discharged debt, the agreement is invalid. *Getzoff,* 180 B.R. at 575; *Liptz & Roberts, Chartered Pension Plan Trust v. Stevens (In re Stevens),* 217 B.R. 757, 761 (Bankr.D.Md.1998); *Cherry v. Arendall (In re Cherry),* 247 B.R. 176, 185-86 (Bankr.E.D.Va.2000); *In re Gardner,* 57 B.R. 609, 610-11 (Bankr.D.Me.1986). This interpretation is not only supported by the Bankruptcy Code, it also comports with common sense. As one bankruptcy court recently noted:

> Every reaffirmation agreement involves some element of new consideration. Otherwise, the debtor would not agree to pay the discharged debt. If new consideration saved a non-complying reaffirmation agreement, little would remain of the protection afforded by § 524(c).

Zarro, 268 B.R. at 721.

The bankruptcy court considered our previous decision, *Watson v. Shandell (In re Watson),* 192 B.R. 739 (9th

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declaration stating that (1) the agreement represents a fully informed and voluntary agreement by the debtor, (2) does not impose an undue hardship on the debtor or a dependent and (3) the attorney has fully advised the debtor of the legal effect and consequences of reaffirmation agreements and of a default under the agreement.

For a debtor not represented by an attorney, the court must approve the agreement, determining that the agreement is in the debtor's best interest and does not impose an undue hardship on the debtor or a dependent, except to the extent the consideration for the agreement is based in part on a consumer debt that is not secured by the debtor's real property.

Cir. BAP 1996), in finding the post-discharge agreement was invalid because it was not supported by new consideration. Although *Watson* has been cited for the proposition that the existence of new consideration is sufficient to create a new contract (*see Stevens,* 217 B.R. at 760), outside of the protection of section 524, the decision is not contrary to *Getzoff, Zarro,* and the other cases just cited.

In *Watson,* a dispute arose over the debtor's pre-petition purchase of a physical therapy business. As part of the deal, the debtor had executed promissory notes which were secured in part by a security interest in the business' outstanding accounts receivable. After the debtor defaulted on the notes, the seller filed suit in state court and obtained injunctive relief. The state court ordered the debtor to provide information about the accounts and turn over proceeds. The debtor then filed a Chapter 7 petition. The seller obtained relief from the automatic stay to pursue the state court action and collect the accounts receivable.

Shortly thereafter, the parties settled the state court litigation. Pursuant to the settlement, the seller released the debtor from all personal liability under the promissory note. In return, the debtor conceded the seller's *in rem* rights to recover the collateral securing the note and agreed to turn over all pre-petition accounts receivable.

The debtor, however, later refused to turn over the accounts receivable, and the seller prevailed in a second action in state court to enforce the settlement agreement. The state court entered a judgment awarding the seller damages and attorney fees. The debtor then attempted to reopen his bankruptcy case to seek a determination that the state court's judgment in the second suit constituted

an impermissible effort to enforce his discharged liability on the promissory notes. The panel sustained the bankruptcy court's denial of the motion to reopen, concluding that because the first state court proceedings were allowed to proceed, the debtor's agreement was not a reaffirmation of the debt on the original note. Instead, the panel found that the agreement "concerned his obligation to provide collateral that had been released from the automatic stay." *Watson,* 192 B.R. at 748. Therefore, the settlement agreement did not constitute an improper reaffirmation agreement. The panel specifically distinguished these facts from instances where "part of the consideration for the new contract is based on a debt that is dischargeable." *Id.*

In this case, Debtors have no obligation to BRM discernible in the second post-discharge agreement without reference to Samuels' pre-petition loan to them: whatever consideration the Debtors may have given, it was predicated on that discharged obligation.

Because the second post-discharge agreement was based in part on a discharged debt, BRM should have complied with section 524. To hold section 524(c) inapplicable to post-discharge agreements in such circumstances would nullify section 524(c) whenever a creditor could convince a debtor to sign such an agreement. If Congress wanted foxes guarding the henhouse, it would not have incorporated section 524(c) into the Bankruptcy Code.

B. *The bankruptcy court did not err when it determined that the complaint contained an implicit cause of action for declaratory relief.*

In its Memorandum Decision on BRM's motion for summary judgment, the bankruptcy court ruled that

Debtors were not entitled to recover damages for a violation of the discharge injunction. The court, however, found implicit in Debtors' claim for relief the contention that the agreement was an unenforceable reaffirmation agreement. Therefore, the court construed the claim "to request, given the absence of a right to damages, a declaration that the agreement is unenforceable."

BRM argues the Debtors waived any right to declaratory relief because they failed specifically to demand such relief in their complaint. As a result of this purported waiver, BRM contends that when the bankruptcy court construed the complaint to include an implicit request for declaratory relief that the second post-discharge agreement was unenforceable, the court improperly amended the complaint to include an unpleaded demand for relief. This argument is not persuasive for several reasons.

First, BRM itself filed a counterclaim in this action in which it contended the second post-discharge agreement was an enforceable contract and asked the bankruptcy court for a declaration to that effect.

Next, Debtors' failure to request declaratory relief specifically did not "waive" their right to such relief. Federal Rule of Civil Procedure 8(a)(3) [7] requires pleadings that set forth a claim for relief to include a demand for judgment for the relief the pleader seeks. This rule, however, must be read in conjunction with Federal Rule of Civil Procedure 8(f), which requires courts to construe

[7] Federal Rule of Civil Procedure 8(a)(3) is made applicable to the underlying adversary proceeding by Federal Rule of Bankruptcy Procedure 7008(a).

pleadings "to do substantial justice." *Id.* The purpose of Rule 8(f) "is to facilitate a decision on the merits, and to give notice to the adversary of the nature or basis of the claim brought against him and the general type of litigation involved." *First City Bank v. Blewett (In re Blewett),* 14 B.R. 840, 841-42 (9th Cir. BAP 1981). "A pleading . . . is to be judged by its substance rather than by its form or label." *Id.* at 842 (citing 5 Wright & Miller, *Federal Practice & Procedure,* § 1286, p. 383). Here, the bankruptcy court did not abuse its discretion in finding an implicit request for declaratory relief as to the validity of the second post-discharge agreement within Debtors' express request for monetary damages for violation of the discharge injunction.

Finally, BRM implicitly consented to trying the issue as amended by the court. Federal Rule of Civil Procedure 15(b) [8] provides that issues actually tried by the express or implied consent of the parties are treated in all respects as if they had been raised in the pleadings, even if the parties have failed formally to amend the pleadings.[9] *Consol. Data*

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[8] Federal Rule of Civil Procedure 15(b) is made applicable to the underlying adversary proceeding by Federal Rule of Bankruptcy Procedure 7015.

[9] The rule provides, in relevant part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; *but failure so to amend does not affect the result of the trial of these issues.*

Fed.R.Civ.P. 15(b) (emphasis supplied).

Terminals v. Applied Digital Data Sys., Inc., 708 F.2d 385, 396 (9th Cir.1983); *see also Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1522 (9th Cir.1985) ("[i]f an amendment should have been made, we will presume that it has been made"). The Court of Appeals for the Ninth Circuit has also noted in dicta that pleadings are deemed amended if the court enters findings on the unpleaded issue. *Galindo v. Stoody Co.*, 793 F.2d 1502, 1513 n. 8 (9th Cir.1986). If the bankruptcy court in fact amended the pleadings pursuant to Rule 15(b), its decision is reviewed for an abuse of discretion. *Davis & Cox*, 751 F.2d at 1522.

The complaint did not specifically request declaratory relief. Nor did the answer to BRM's counterclaim raise mistake as a defense. Debtors never amended their complaint. Nonetheless, there is no evidence in the record that BRM ever objected to the court's interpretation of the pleadings. On the contrary, BRM actively engaged the claim as framed by the bankruptcy court both in its pretrial brief and at trial. In addition, BRM was not prejudiced by the court's construction. *See Consolidated Data*, 708 F.2d at 396 (finding late pleading amendments are improper if they cause "substantial prejudice to the opposing party"). It appears BRM understood the Debtors' request for declaratory relief was before the court. It clearly understood that its own request was as well.

BRM should also have understood that as the bankruptcy court framed the issue for trial, mistake was a potential defense and rescission a potential remedy. In its Memorandum Decision, the court explained that the court was unable to discern what type of agreement Debtors had entered into. Only after the court determined the nature of the agreement could it consider possible defenses and remedies, including mistake and rescission.

The bankruptcy court, therefore, did not abuse its discretion by dealing with the declaratory relief issue.

C. *Debtors' request for a declaration that the second post-discharge agreement was invalid did not constitute an impermissible private right of action to remedy BRM's discharge injunction violation.*

BRM next argues the Debtors' claim, even when limited to a request for a declaration that the second post-discharge agreement was invalid, constituted an impermissible private right of action to remedy BRM's alleged violation of the discharge injunction. BRM contends that if the bankruptcy court had not improperly permitted Debtors to prosecute this private right of action, the complaint would have been dismissed. BRM's argument is without merit.

During the pendency of this appeal, the Ninth Circuit held that no private right of action for damages exists for violation of the discharge injunction. *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 509 (9th Cir.2002). This ruling is in accord with this panel's prior ruling in *Bassett v. Am. Gen. Fin., Inc. (In re Bassett),* 255 B.R. 747, 755-57 (9th Cir. BAP 2000), the decision relied upon by the bankruptcy court in this case. However, we did not decide *Bassett* until November 17, 2000. The complaint in this case was filed on December 3, 1999, almost a full year earlier. In *Bassett,* we specifically noted a split of authority existed as to whether a debtor could assert a private right of action for violation of section 524. *Bassett,* 255 B.R. at 754. A majority of decisions at the time held that section 524 did not create a private right of action. Nevertheless, a minority of decisions, including at least one published decision from the Eastern District of California (the same jurisdiction

where this case originated), recognized an implied private right of action under section 524. *Bassett* 255 B.R. at 754, (citing *Malone v. Norwest Fin. Cal. Inc.,* 245 B.R. 389, 395-98 (E.D.Cal.2000)) (other citations omitted).

Under these circumstances, it was neither unreasonable nor improper for Debtors to allege BRM violated the discharge injunction or to request ordinary and punitive damages in their complaint. The Ninth Circuit's decision in *Walls* and our decision in *Bassett,* however, foreclosed Debtors' right to pursue a private right of action for damages. As a result, the bankruptcy court properly granted BRM's motion for summary judgment to the extent the complaint constituted a claim for damages for violation of the discharge injunction.

Walls, however, did not leave Debtors without any rights against BRM. The Ninth Circuit noted that civil contempt proceedings are the appropriate means to remedy discharge injunction violations. *Walls,* 276 F.3d at 509. *See also, Bassett,* 255 B.R. at 757 (finding bankruptcy courts retain "broad discretion" to fashion a remedy for violation of the discharge injunction through their contempt powers). While the bankruptcy court could have required Debtors to amend their complaint, it certainly did not abuse its discretion when it instead narrowed the relief available to Debtors to a declaration that the second post-discharge agreement was unenforceable and simply proceeded to trial on this basis. It also appears that BRM did not object to the court's construction of the complaint after the summary judgment ruling and prior to trial, and therefore implicitly consented to try the issue as framed by the bankruptcy court. Fed.R.Civ.P. 15(b); *Consolidated Data,* 708 F.2d at 396.

D. *The bankruptcy court properly determined Debtors were entitled to rescind the second post-discharge agreement.*

1. *Debtors' failure to plead mistake or rescission in their complaint or their answer did not preclude the bankruptcy court from rescinding the agreement.*

BRM points out that Debtors never plead a claim or defense founded on "mistake of law" and never demanded a judgment for rescission. BRM contends that the bankruptcy court somehow "prejudiced" it when it purportedly "pulled" the defense of mistake and remedy of rescission "out of thin air after trial." It appears that BRM contends the bankruptcy court lacked the authority to base its ruling on mistake or grant the remedy of rescission because the Debtors' failure to plead mistake as an affirmative defense or with particularity as required by Federal Rule of Civil Procedure 9(b) waived the defense.

BRM's argument is not supported by the record. The bankruptcy court did not "pull the issue out of thin air after trial." Instead, it appears the court merely applied a different analysis than the parties suggested or anticipated. At the summary judgment stage, the court noted genuine disputes of material fact existed as to the type and validity of the second post- discharge agreement. The court had interpreted the Debtors' complaint to include a request for a declaration that the agreement was invalid. BRM's counterclaim contended, *inter alia,* that the agreement was an enforceable contract that the Debtors had breached. The whole point of the trial was to settle the disputed factual issues in order to determine the nature of the agreement. Only after reviewing the testimony and other evidence submitted at trial was the bankruptcy

court in a position to decide the parties had not formed a new contract and that the agreement was voidable under California law.

2. *The bankruptcy court's finding that statements of BRM's employee induced Debtors to sign the second post-discharge agreement was not clearly erroneous.*

BRM next attacks the bankruptcy court's factual finding that BRM's employee's statements induced the Debtors to sign the second post-discharge agreement. According to BRM, the bankruptcy court "abused its discretion" by twisting facts to transform BRM's "reasonable offer to contract or surrender into a false, fraudulent and oppressive demand." Building on this allegedly mistaken factual finding, BRM argues the bankruptcy court erred when it determined Debtors made a mistake of law pursuant to California Civil Code section 1578. According to BRM, no misapprehension existed because Debtors believed they did not have to sign the second post-discharge agreement at the time they signed it.

To support its argument, BRM points to what it perceives to be a conflict between statements in Mr. Lopez's deposition testimony and his trial testimony. In his deposition, BRM's counsel asked Mr. Lopez whether, at the time he signed the second post-discharge agreement, the following statement was true: "Promisors (sic) understand that they are not required to sign this agreement." Mr. Lopez responded "At the time I signed it, yes." In his alternate direct testimony, Mr. Lopez indicated that after he received a copy of the second post-discharge agreement, he "received a call from a person from Bankruptcy Receivables Management [who] stated that [he] had to sign the

document that they had sent to us and return it immediately." At trial, Mr. Lopez testified that:

> The lady called from BRM and said, "Did you receive a contract? You need to sign it and send it back. So we did so."

BRM's counsel did not cross-examine Mr. Lopez on this point.

BRM further contends that the bankruptcy court disregarded certain evidence, including (1) Debtors' Chapter 7 Statement of Intentions in which they elected to "retain and reaffirm"; (2) the September 1998 letter from BRM to Debtors' counsel; and (3) the February 1999 letter from BRM to Debtors' former counsel.

The court's finding that BRM's employee's statements induced Debtors to sign the second post-discharge agreement is a finding of fact which shall not be set aside unless it is clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness. Fed.R.Civ.P. 52(a);[10] *Amadeo v. Zant,* 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988); *Anderson v. City of Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). "'A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Anderson,* 470 U.S. at 573, 105 S.Ct. 1504 (quoting *United*

[10] Federal Rule of Civil Procedure 52(a) is made applicable to the underlying adversary proceeding by Federal Rule of Bankruptcy Procedure 7052.

States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)).

The bankruptcy court's finding was not clearly erroneous. In reaching its decision, the bankruptcy court evaluated the correspondence cited by BRM, Vinciguerra's declaration, and the credibility of the witnesses, including Debtors. The court specifically found Vinciguerra's declaration and BRM's version of events was not credible. Instead, the court believed Debtors' testimony. It was certainly not unreasonable, let alone "clearly erroneous," for the court to conclude that Vinciguerra induced Debtors to sign the second post-discharge agreement. Indeed, where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *Anderson,* 470 U.S. at 574, 105 S.Ct. 1504.

3. *The bankruptcy court did not err when it determined that Debtors were entitled to rescind the second post-discharge agreement pursuant to California Civil Code §§ 1689 and 1691.*

Finally, BRM contends the Debtors failed to give them notice of rescission or offer to return the jewelry in accordance with the procedures provided in California Civil Code section 1691.[11] As a result, BRM argues the

[11] California Civil Code § 1691 provides:

Subject to Section 1693, to effect a rescission a party to the contract must, promptly upon discovering the facts which entitle him to rescind if he is free from duress, menace, undue influence or disability and is aware of his right to rescind:

(Continued on following page)

bankruptcy court erred when it rescinded the second post-discharge agreement. Section 1691 provides that subject to California Civil Code section 1693,[12] a party aware of his right to rescind a contract must promptly do two things upon discovering the facts entitling him to rescind. He must (1) give notice to the other party and (2) depending on the circumstances, either restore or offer to restore to the other party everything of value he received under the contract.

> (a) Give notice of rescission to the party as to whom he rescinds; and
>
> (b) Restore to the other party everything of value which he has received from him under the contract or offer to restore the same upon condition that the other party do likewise, unless the latter is unable or positively refuses to do so.

When notice of rescission has not otherwise been given or an offer to restore the benefits received under the contract has not otherwise been made, the service of a pleading in an action or proceeding that seeks relief based on rescission shall be deemed to be such notice or offer or both.

[12] California Civil Code § 1693 provides:

> When relief based upon rescission is claimed in an action or proceeding, such relief shall not be denied because of delay in giving notice of rescission unless such delay has been substantially prejudicial to the other party.
>
> A party who has received benefits by reason of a contract that is subject to rescission and who in an action or proceeding seeks relief based upon rescission shall not be denied relief because of a delay in restoring or in tendering restoration of such benefits before judgment unless such delay has been substantially prejudicial to the other party. . . .

There is no evidence in the record that Debtors were aware they had a right to rescind the second post-discharge agreement until they consulted with their current attorney, reopened their bankruptcy case and filed the complaint. The record does, however, contain uncontradicted evidence that Debtors offered to return the jewelry to BRM before they initiated legal action against BRM. In her deposition, Ms. Lopez stated that she offered to return the jewelry to BRM "five or six months" after she and her husband signed the second post- discharge agreement because they "would have a hard time making the payments." At trial, Ms. Lopez testified that at some point she and her husband stopped making payments and attempted to return the jewelry to BRM. She testified that she called and spoke with a BRM representative and was told that "it was too late [to return the jewelry]" because Debtors had already "signed the document." BRM's counsel did not cross-examine Ms. Lopez. Nor does the record reflect that he offered any evidence to contradict her testimony.

Under the circumstances, Ms. Lopez's offer to stop making payments and to return the jewelry satisfied both the requirement that Debtors give notice of their intent to rescind the second post-discharge agreement and the requirement that they offer to restore everything of value under the contract. Therefore, Debtors were entitled to rescind the agreement under California law.

V.

CONCLUSION

For the foregoing reasons, the panel determines that the second post-discharge agreement violated section 524

and was therefore invalid and unenforceable. The panel also determines that the bankruptcy court did not err in determining that the complaint contained an implicit cause of action for declaratory relief or that BRM consented to trying the issue as amended by the bankruptcy court by filing its counterclaim and by failing to object to the bankruptcy court's interpretation of the complaint. The panel concludes that Debtors' request for a declaration that the second post-discharge agreement was invalid did not constitute an impermissible private right of action to remedy BRM's discharge injunction violation. Finally, the panel further concludes that Debtors were entitled to rescind the agreement pursuant to California Civil Code sections 1689 and 1691. Accordingly, the bankruptcy court's rulings are AFFIRMED.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re CHARLES LOPEZ and JULIE LOPEZ, Debtors.	Case No. 98-31825-A-7
CHARLES LOPEZ and JULIE LOPEZ, Plaintiffs, vs. SAMUELS JEWELERS, INC., BANKRUPTCY RECEIVABLES MANAGEMENT, and RICHARD W. SNYDER, in his capacity as an individual, Defendants.	Adv. No. 99-2726 Date: January 17, 2001 Time: 10:00 a.m.
AND RELATED COUNTERCLAIM	

MEMORANDUM DECISION

(Filed Mar. 28, 2001)

This matter was tried before the court sitting without a jury on January 17, 2001. John R. Roberts, Esq., appeared for the plaintiffs, Charles Lopez and Julie Lopez. Mark E. Ellis, Esq. of Murphy, Pearson, Bradley & Feeney appeared for the defendants, Bankruptcy Receivables Management ("BRM") and Samuels Jewelers, Inc., ("Samuels"). Before

trial on March 13, 2000, the claims against defendant Richard W. Snyder were dismissed.

I

The plaintiffs purchased a diamond ring and other jewelry[1] from Samuels for $5,623.01. Samuels financed the purchase and took a security interest in the jewelry pursuant to a security agreement executed by the plaintiffs.

Thereafter, the plaintiffs filed a chapter 7 petition. In it, the plaintiffs declared their intention to reaffirm their debt to Samuels. During the pendency of the case, Samuels assigned its rights to BRM. BRM then sent a reaffirmation agreement to the plaintiffs' attorney. The attorney forwarded the proposed reaffirmation agreement to the plaintiffs with a cover letter counseling against reaffirmation. The plaintiffs did not execute the reaffirmation agreement.

After the plaintiffs received their bankruptcy discharge, Shannon Vinciguerra, a legal assistant employed by BRM, sent a letter to the plaintiffs' attorney, American Law Center. The letter demanded the return of the jewelry, but also offered the plaintiffs the option of retaining the jewelry if they paid a lump sum or if they executed a post-discharge "retention agreement". This agreement accompanied the letter. It provided, among other things, that the plaintiffs could retain the jewelry if they paid the remaining balance of the debt in monthly installments

[1] The jewelry consisted of a 1 carat diamond, a ½ carat diamond Tiffany pendent, an 18" gold necklace, a 3 carat total weight diamond ring, and a 20" gold necklace.

with interest. Ms. Vinciguerra's letter warned that if counsel did not respond within 10 days, BRM would assume that counsel was no longer representing the plaintiffs.

In fact, counsel was no longer representing the plaintiffs. Michael O'Neal, the principal of American Law Center, claims to have forwarded the letter to the plaintiffs but there is no indication that he forwarded the retention agreement to the plaintiffs. The plaintiffs assert that they never received the letter or the retention agreement from their former attorney.

Because counsel did not answer BRM's letter, BRM contacted the plaintiffs directly. In February, 1999, BRM sent the plaintiffs a second post-discharge agreement ("the second post-discharge agreement"), which provided that BRM would forebear from repossessing the jewelry if the plaintiffs would agree to make payments to BRM. Under the second post-discharge agreement, the plaintiffs would be obligated to pay the entire remaining contract debt, $3,030.35, plus interest at the contract rate of 22.8% per annum, all payable at the rate of $100.00 per month.

Ms. Vinciguerra telephoned the plaintiffs concerning the jewelry and the second post-discharge agreement. According to Mr. Lopez, Ms. Vinciguerra or another agent of BRM told him that he "had to sign" the second post-discharge agreement and return it immediately to BRM. Mr. Lopez asserts that BRM did not discuss any other options with him, did not explain that he had the right to simply return the jewelry, did not explain the terms of the second post-discharge agreement, and did not suggest that the plaintiffs seek the advice of counsel.

Ms. Vinciguerra tells a different story. She declares that she did not demand that the plaintiffs sign the second

post-discharge agreement and further did not threaten them with legal action. She also declares that she told them that they could surrender the property if they chose to do so.

As explained below, the court does not believe Ms. Vinciguerra's and BRM's version of events. The court believes that the plaintiffs were told that they were required to sign the second post-discharge agreement.

On February 27, 1999, the plaintiffs signed the second post-discharge agreement after altering it to reflect monthly payments of $85.00 and returned it to BRM. They made one payment of $85.00. They also made a payment of $170.00 but stopped payment on the check before it was presented for payment by BRM. The plaintiffs assert that they attempted to return the jewelry but BRM would not accept it.

Because BRM threatened to sue them, the plaintiffs reopened their bankruptcy case and filed this adversary complaint. The complaint originally included causes of action for violation of the discharge injunction, fraud, undue influence, and malice.

BRM filed a counterclaim for breach of the second post-discharge agreement, declaratory relief, attorney's fees, and conversion. BRM asserts that the second post-discharge agreement is valid, that the plaintiffs breached their obligations under the second post-discharge agreement, and that the plaintiffs have refused a demand for turnover of the jewelry. The plaintiffs' answer to BRM's counterclaim denies that the second post-discharge agreement is enforceable, denies that the defendants demanded the return of the jewelry, and denies that the jewelry has a value of $3,030.35.

II

The plaintiffs assert that the second post-discharge agreement is an improper reaffirmation agreement of a pre-petition debt that was discharged in bankruptcy. Because the reaffirmation agreement does not pass muster under 11 U.S.C. § 524(c) and (d), the plaintiffs assert that it is void and the attempt to collect the discharged debt is a violation of the discharge injunction of 11 U.S.C. § 542(a)(2).

BRM and the remaining defendants maintain that the second post-discharge agreement is not a reaffirmation agreement but is a valid post-petition contract that is supported by consideration other than the original discharged debt. The new consideration is BRM's forebearance of its right to repossess the jewelry.

The Ninth Circuit Bankruptcy Appellate Panel has held that a debtor and a secured creditor whose underlying claim was discharged in bankruptcy may enter into a valid and enforceable post-discharge contract that permits the debtor to retain the property that secured the discharged debt. *See Watson v. Shandell* (*In re Watson*), 192 B.R. 739, 747-48 (B.A.P. 9th Cir. 1996). The decision to forebear from pursuing the collateral may be sufficient consideration to support a new contract. *Id. See also In re Heirholzer*, 170 B.R. 938, 941 (Bankr. N.D. Ohio 1994).

In this case, however, the court concludes that a new contract was not formed. The second post-discharge agreement is voidable under California law and may be declared void.

It is essential to the existence of a contract that there be: (1) parties capable of contracting; (2) their consent; (3)

a lawful object; and (4) a sufficient cause or consideration. Cal. Civil Code § 1550. The consent to a contract must be free, mutual, and communicated by each party to the other. Cal. Civil Code § 1565. A consent which is not free is nevertheless not absolutely void, but may be rescinded. Cal. Civil Code § 1566. Consent is not free when obtained through mistake. Cal. Civil Code § 1567. Mistake may be either of fact or law. Cal. Civil Code § 1576. Mistake of law constitutes a mistake only when it arises from (1) a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or (2) a misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify. Cal. Civil Code § 1578.

The court concludes that the plaintiffs were under the misapprehension that they had no alternative but to execute the second post-discharge agreement. There is ample evidence to support this conclusion.

First, the sequence of events generally confused the plaintiffs. They initially believed that they were going to reaffirm the debt and then their attorney advised against it. Then, when they were without the benefit of counsel, they received the second post-discharge agreement and an admonition from BRM that they had to sign it. While this sequence of events might not lead some debtors to misunderstand their legal options, the plaintiffs are unsophisticated in matters of business and law. There is nothing in their educational or occupational backgrounds that would suggest the plaintiffs understood they were not required to sign the second post-discharge agreement.

Second, and by contrast, both BRM and Samuels are sophisticated business organizations. The agents who communicated with the plaintiffs concerning the second post-discharge agreement knew that the plaintiffs had other options, and yet, indicated to the plaintiffs that they were required to sign the second post-discharge agreement.

Third, the plaintiffs never received any written explanation of their post-discharge options from either their attorney or BRM. Nor was the February 4, 1999, letter from BRM forwarded to the plaintiffs by Mr. O'Neal. While he has stated otherwise, Mr. O'Neal offered no corroboration, such as a transmittal letter, a memo, or a telephone log to support this assertion.

The plaintiffs, on the other hand, testified that they have never met Mr. O'Neal and that they met only one attorney from American Law Center at the first meeting of creditors. Considering that American Law Center has a high volume consumer bankruptcy practice, the court finds that Mr. O'Neal's recollection of this distant, brief, and unremarkable event is not credible, particularly given the absence of any corroborating documentation or testimony from the attorneys who allegedly actually assisted the plaintiffs.

Nor is there any evidence that BRM sent a letter similar to the February 4, 1999, letter to the plaintiffs. There is only evidence that BRM sent the plaintiffs another post-discharge agreement. Mrs. Lopez testified at her deposition that she did not even read the second post-discharge agreement much less read an explanation of its terms or implications.

Fourth, the court believes that the plaintiffs were told by BRM's agent that they were required to sign the second post-discharge agreement. The only BRM agent who

contacted the plaintiffs and also testified in this matter is Ms. Vinciguerra. Her version of events is not corroborated by a phone log or a memo. Given that she works in BRM's collection department and presumably regularly speaks with many account debtors, it simply is not believable that she would have a detailed and accurate recall of one conversation among many others without the benefit of notes or contemporaneous records.

The court concludes that the plaintiffs were told by Ms. Vinciguerra that they were required to sign the second post-discharge agreement, notwithstanding their discharge. Mr. Lopez testified in his alternate direct testimony he believed that he had to sign the second post-discharge agreement. This is consistent with his deposition testimony in which he stated that BRM told him that "Hey, you got to sign it and send it back again."[2] And also told him, "you got to send this back so we know where to set [send] your payment."[3] Mrs. Lopez testified in her alternate direct testimony that she believed she had to sign the second post-discharge agreement. At her deposition she testified that she signed it because her husband indicated that BRM was pressuring him.

Mr. Bruce Jackman, president of BRM, does not state that he had any contacts with the plaintiffs. He states that he has reviewed "all files and telephone logs"[4] regarding

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[2] Defendants' Exhibit G, Declaration of Charles Lopez, page 65, lines 18-19.

[3] Defendants' Exhibit G, Declaration of Charles Lopez, page 66, lines 17-18.

[4] Alternate Direct Testimony of Bruce Jackman, page 1, lines 24-25.

the plaintiffs' account. Yet none of the telephone logs, which would go a long way to supporting his assertions, were entered into evidence. Nor does Mr. Jackman refer to the telephone logs after he states that he has reviewed them. The logs are conspicuous by their absence.

Nor does Mr. Jackman offer testimony concerning any conversation that he had with the plaintiffs. He testifies only that BRM engages in certain enumerated established practices and policies and that the plaintiffs never made an offer to him to return the jewelry. It is unclear whether he even talked to the plaintiffs.

By the time the second post-discharge agreement was before the plaintiffs, it is easy to understand how they believed they had no other recourse but to sign it. They had just gone through a bankruptcy in which they met their attorney at the courthouse.[5] Their attorney prepared a "statement of intention" indicating that the plaintiffs would reaffirm the debt to Samuels but then suggested via a form letter that entry into a reaffirmation agreement should be "avoided if at all possible." The plaintiffs received no advice from counsel regarding either post-discharge agreement. Rather, the only person to talk to them about the second post-discharge agreement was an agent of BRM who had every incentive to convince the

[5] While Mr. O'Neal testified in his alternative direct testimony declaration that the plaintiffs met with two different attorneys prior to meeting a third attorney at the first meeting, the court discounts the testimony. None of these attorneys testified and the basis for Mr. O'Neal's personal knowledge is unclear.

plaintiffs re-enter into essentially the same onerous contract[6] and keep the jewelry.

California courts have granted relief for a unilateral mistake of law when the defendant induced the mistake by making a misstatement to the other party. *See* 1 Witkin, *Summary of California Law*, "Contracts," § 379, p. 345 (1987) (citing *Simmons v. Briggs*, 69 C.A. 447 (1924) and other cases). In this case, Ms. Vinciguerra's statements induced the plaintiffs to believe they were required to sign the second post-discharge agreement when they were under no such obligation.

A consent which is not free may be rescinded. Cal. Civil Code § 1566. A party to a contract may rescind the contract if the consent of the party rescinding was given by mistake. Cal. Civil Code § 1689(b)(1). Rescission is the proper relief in this case.

In some instances, however, a judgment rescinding a contract necessarily requires more than a declaration that the contract is void.

> A claim for damages is not inconsistent with a claim for relief based upon rescission. The aggrieved party shall be awarded complete relief, including restitution of benefits, if any, conferred by him as a result of the transaction . . . but such

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[6] Repayment of $3,030.35 at $85.00 a month with 22.8% annual interest would required 60.1 monthly payments. The plaintiffs would have paid a total of $5,108.50 to BRM under the terms of the second post-discharge agreement.

> relief shall not include duplicate or inconsistent items of recovery.

Cal. Civil Code § 1691.

Rescission effects the extinguishment of a contract. Cal. Civil Code § 1688. It follows that any payments made under the contract by the plaintiffs to the defendants constitute benefits conferred as a result of the transaction. There is uncontroverted evidence that the plaintiffs made one payment of $85.00 under the second post-discharge agreement. BRM shall return that amount to the plaintiffs.

The extinguishment of a voidable contract may also affect the rights of the party not seeking rescission.

> If in an action or proceeding a party seeks relief based on rescission, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require and may otherwise in its judgment adjust the equities between the parties.

Cal. Civil Code § 1691.

Under the second post-discharge agreement, the plaintiffs were allowed to retain the jewelry. With rescission, they no longer have that right. The judgment will provide that the plaintiffs shall turn the jewelry over to the defendants.

As an alternative ground for relief, the court concludes that the second post-discharge agreement is not supported by new consideration as required by *Watson*. The plaintiffs had the right to retain the jewelry without reaffirming the original contract pursuant to 11 U.S.C. § 524 or redeeming the jewelry pursuant to 11 U.S.C. § 722. *See Parker v. McClellan Federal Credit Union*, 139

F.3d 668 (9th Cir. 1998). To retain the jewelry the plaintiffs were entitled by *Parker* to voluntarily abide by the remaining terms of their original contract. In the event of any breach or in the event the plaintiffs decided to stop performing the original agreement, the defendants would be limited to repossession of the jewelry because the plaintiffs' personal liability on the original contract would have been discharged.

So, when the BRM permitted the plaintiffs to retain the jewelry, it was merely acquiescing in what *Parker* allows. BRM gave up no valuable right by permitting the plaintiffs to retain the jewelry. The only difference between the original agreement and the second post-discharge agreement was the monthly installment – it was reduced to $85.00. But this difference is so slight that it is not significant. The plaintiffs were merely exercising their right to retain the jewelry and were not incurring a new and different liability to the defendants.[7] *Cf. In re Brown*, 220 B.R. 101 (Bankr. C.D. Cal. 1998, *remanded*, 235 B.R. 644 (C.D. Cal. 1999).[8]

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[7] This is particularly so when one considers that by reducing the monthly payment to $85.00 the debtors benefitted rather than burdened the defendants. The defendants were entitled to collect 22.8% interest on a more slowly dwindling principal.

[8] In *Brown*, the debtor and the creditor entered into a "Post Discharge Property Retention Agreement" that permitted the debtor to retain a $760.00 necklace by paying the $460.15 contract balance. The monthly payment of $15.00 was identical to the original installment agreement but the interest rate was reduced from 22.8% to 12% per year. The bankruptcy court rejected the creditor's argument that this was a valid post-petition agreement as permitted by *Watson*, finding that the change in contract terms was insignificant. On appeal, the

(Continued on following page)

Finally, the second post-discharge agreement contains a clause that provides for an award of reasonable attorney fees and costs to the prevailing party in any litigation concerning the agreement. In this case, neither party prevailed. The plaintiffs sought rescission, but also sought compensatory and punitive damages. They will be awarded the former but not the latter. The defendants sought a money judgment based on conversion or the second post-discharge agreement. They will receive nothing other than the return of their collateral – something the plaintiffs wished to do before the action was filed. It cannot be said that either party prevailed to a greater extent than the other in this matter.

The Supreme Court of California has provided guidance for trial courts to follow in deciding which party prevails: "In deciding whether there is a party prevailing on the contract, the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs opening statements, and similar sources." (Internal quotation marks omitted.) *Scott Co. of California v. Blount, Inc.*, 20 Cal. 4th 1103, 1109, 979 P.2d 974, 86 Cal. Rptr.2d 614, 618 (1999) (quoting *Hsu v. Abbara*, 9 Cal. 4th 863, 876, Cal. Rptr.2d 824, 891 P.2d 804 (1995)).

As early as 1980, in *Kytasty v. Godwin*, 102 Cal. App.3d 762 [162 Cal. Rptr. 556] (1980), the Courts of Appeal recognized that the results of litigation may be so

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district court remanded the proceeding to the bankruptcy court for further findings.

equivocal as to permit or even require that no party be found to have prevailed for purposes of attorney fees under section 1717. In *Kytasty*, the trial court found that an easement was valid, but was narrower in scope than pleaded. The appellate court declined to award fees under section 1717. The court in *Kytasty* concluded: "The judgment as well as this opinion must be considered good news and bad news to each of the parties, and in good conscience we cannot say attorneys' fees should be awarded either for the trial or for this appeal." *Kytasty v. Godwin*, 102 Cal. App.3d 762, 774 (1980).

The court concludes that there was no prevailing party in this case. Therefore, it is appropriate to withhold an award of attorneys' fees from both parties. Cal. Civil Code § 1717(b)(1).

III

The second post-discharge agreement shall be rescinded because the plaintiffs entered into it as a result of a mistake of law that was induced by BRM's agents. The plaintiffs will be required to turn over the jewelry to the defendants. The defendants shall return the $85.00 payment to the plaintiffs.

Because of its conclusion that the second post-discharge agreement may be rescinded for reasons unrelated to section 524, the court comes to no conclusion concerning the claim that the agreement is an unenforceable reaffirmation agreement.

The court will issue a judgment.

Dated: 28 March 2001

By the Court

/s/ Michael S. McManus
Michael S. McManus, Chief Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
CERTIFICATE OF MAILING

The undersigned deputy clerk in the office of the United States Bankruptcy Court for the Eastern District of California hereby certifies that a copy of the document to which this certificate is attached was mailed today to the following entities listed at the address shown on the attached list or shown below.

Mark E. Ellis
Murphy, Pearson, Bradley & Feeney
701 University Ave #150
Sacramento, CA 95865

Charles Lopez
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Clovis, CA 93611

Julie Lopez
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Sacramento, CA 95814

Dated: 5-30-01

/s/ Janet M. Larson
Deputy Clerk

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re CHARLES LOPEZ and JULIE LOPEZ, Debtors.	Case No. 98-31825-A-7
CHARLES LOPEZ and JULIE LOPEZ, Plaintiffs, vs. SAMUELS JEWELERS, INC., BANKRUPTCY RECEIVABLES MANAGEMENT, and RICHARD W. SNYDER, in his capacity as an individual, Defendants.	Adv. No. 99-2726 Date: January 17, 2001 Time: 10:00 a.m.
AND RELATED COUNTERCLAIM	

JUDGMENT

(Filed Mar. 28, 2001)

This matter was tried before the court sitting without a jury on January 17, 2001. John R. Roberts, Esq., appeared for the plaintiffs, Charles Lopez and Julie Lopez. Mark E. Ellis, Esq. of Murphy, Pearson, Bradley & Feeney appeared for the defendants, Bankruptcy Receivables Management

("BRM") and Samuels Jewelers, Inc., ("Samuels"). Before trial, on March 13, 2000, the claims against defendant Richard W. Snyder were dismissed.

For the reasons explained in the accompanying Memorandum Decision and in the Memorandum Decision filed on December 9, 2000 in connection with the defendants' motion for summary judgment, judgment is hereby rendered as follows:

1. The Post-Discharge Property Retention Agreement signed by the plaintiffs on February 27, 1999, is ordered rescinded and shall have no force and effect.

2. Defendant Bankruptcy Receivable Management shall pay to the plaintiffs the sum of $85.00.

3. The plaintiffs shall turnover to defendant Bankruptcy Receivable Management the jewelry referred to in the Post-Discharge Property Retention Agreement.

4. The parties shall bear their own attorneys' fees.

5. The parties shall bear their own costs.

6. The plaintiffs shall take nothing further pursuant to their complaint.

7. The defendants shall be awarded nothing in connection with their counterclaim.

Dated: 28 March 2001

By the Court
/s/ Michael S. McManus
Michael S. McManus,
Chief Judge
United States
Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
CERTIFICATE OF MAILING

The undersigned deputy clerk in the office of the United States Bankruptcy Court for the Eastern District of California hereby certifies that a copy of the document to which this certificate is attached was mailed today to the following entities listed at the address shown on the attached list or shown below.

Mark E. Ellis
Murphy Pearson, Bradley & Feeney
701 University Ave #150
Sacramento, CA 95865

Charles Lopez
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Clovis, CA 93611

Julie Lopez
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Richard Synder
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Sacramento, CA 95814

John Roberts
2744 Coloma St
Placerville, CA 95667

Office of the U.S. Trustee
501 I Street, Suite 7-500
Sacramento, CA 95814

Dated: 3-30-01

/s/ Janet M. Larson
Deputy Clerk

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re CHARLES LOPEZ and JULIE LOPEZ, Debtors.	
CHARLES LOPEZ and JULIE LOPEZ, Plaintiffs, SAMUELS JEWELERS, INC., BANKRUPTCY RECEIVABLES MANAGEMENT, and RICHARD W. SNYDER, in his capacity as an individual, Defendants.	Case No. 98-31825-A-7 Adversary No. 99-2726 Date: January 8, 2001 Time: 10:00 a.m.

MEMORANDUM DECISION

(Filed Jan. 9, 2001)

On July 30, 1998, the plaintiffs filed a chapter 7 petition. On November 5, 1998, the plaintiffs' discharge was entered. On December 1, 1998, the case was closed.

Pre-petition, the plaintiffs purchased a diamond ring and other jewelry ("the Collateral") from the defendant, Samuels Jewelers ("Samuels") for $5,623.01. Samuels financed the purchase and took a security interest in the Collateral. In February, 1999, Samuels sent the plaintiffs a "Post Discharge Property Retention Agreement" ("the Agreement"), which provided that Samuels would forebear from repossessing the Collateral if the plaintiffs would

execute the Agreement and perform it. Under the Agreement, the defendants would be obligated for the remaining contract debt, $3,030.35, plus interest at the rate of 22.8% per annum, to be paid at the rate of $85.00 per month. The Agreement deviated from the terms of the original contract in one respect – the minimum monthly payment was reduced from $100.00 to $85.00 a month. The plaintiffs made one of the reduced installment payments.

On November 11, 1999, the court signed an order reopening the case and on December 3, 1999, the plaintiffs filed the instant complaint alleging four claims for relief. By order dated March 14, 2000, the court (Judge Russell presiding) dismissed the second, third, and fourth claims for relief. The order dismissing these three claims for relief specified that the plaintiffs could file an amended complaint within 30 days. The debtors declined to do so. Thus, the only remaining claim for relief is the first cause of action, which seeks damages for violation of the discharge injunction.

On December 27, 1999, Samuels assigned all of its rights in the Collateral to Bankruptcy Receivables Management ("BRM"). On January 1, 2000, defendant BRM filed a counterclaim for breach of the Agreement, declaratory relief, attorney's fees, and conversion. BRM asserts that the Agreement is valid, that the plaintiffs have breached their obligations under the Agreement, and that the plaintiffs have refused a demand for turnover the Collateral. On January 28, 2000, the plaintiffs filed an answer to BRM's counterclaim. In the answer, the plaintiffs denied that the Agreement is valid, denied that the defendants had demanded the return of the Collateral, and denied that the Collateral has a value of $3,030.35.

On October 23, 2000, BRM and Samuels filed an answer denying the essential allegation of the complaint.

A motion for summary judgment must be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c) as made applicable in this proceeding by Fed.R.Bankr.P. 7056.

The defendants make three arguments in their motion for summary judgment. First, they argue that, as a matter of law, the plaintiffs have no private right of action for damages arising from a violation of the discharge injunction.

The Ninth Circuit Bankruptcy Appellate Panel recently held that debtors do not have a private right of action for damages for violation of 11 U.S.C. § 524. *Bassett v. American General Finance, Inc.*, 255 B.R. 747 (B.A.P. 9th Cir. 2000). That court reviewed the arguments for and against the proposition and held that the "majority line of cases holding there is no private right of action for violation of § 524 is more persuasive." *Id.* at 755. The court concluded that contempt could be used to address a violation of the discharge injunction. *Id.* (*citing Walls v. Wells Fargo Bank*, 225 B.R. 38 (E.D. Cal. 2000).)

Accordingly, the motion for summary adjudication is granted in part. The plaintiffs are not entitled to recover damages for any violation of the discharge injunction. However, implicit in this claim for relief is the contention that the Agreement is an unenforceable reaffirmation agreement. The court construes it to request, given the

absence of a right to damages, a declaration that the Agreement is unenforceable.

Second, the defendants argue that the plaintiffs are "estopped . . . from asserting the Samuels Jewelers debt was barred from collection by virtue of the discharge injunction since they failed to comply with § 521 as to this debt." Section 521 provides that a debtor shall file a statement of his intention with respect to the retention or surrender of property of the estate that secures consumer debts. The defendants did not file this statement nor did they reaffirm the debt or redeem or surrender the Collateral.

The defendants assert the rather astounding proposition that the failure to file this statement and to reaffirm the debt or redeem or surrender the Collateral resulted in the non-dischargeability of the underlying debt. The defendants wrongly rely on *In re Weir*, 173 B.R. 682 (Bankr. E.D. Cal. 1994), to support of this proposition. *Weir* holds that if a debtor does not file a statement of his intention to surrender, redeem; or reaffirm, then the creditor may obtain relief from the automatic stay and foreclose on its collateral if the debtor defaults under the terms of the original contract. *Weir* does not hold that the failure to file the statement or to timely reaffirm, redeem, or surrender the collateral is a default of the contract or renders the debt nondischargeable. The opinion holds only that the failure to file the statement is a ground for relief from the automatic stay. *Weir* makes no statement regarding the dischargeability of the underlying claim.

Third, the defendants argue that Agreement represented a "new contract" between the parties and as such does not violate the discharge injunction. If the "new

contract" met the requirements for a reaffirmation agreement or a redemption agreement, it is valid.

Any agreement based on the pre-petition liability must satisfy the requirements of a reaffirmation agreement. Five requirements must be fulfilled to properly reaffirm a previously discharged debt: (1) the agreement must be made prior to discharge; (2) the agreement must advise the debtor that the reaffirmation may be rescinded up to sixty days after it is filed; (3) the agreement must be filed with the court; (4) the debtor cannot already have rescinded the agreement within the proper time frame; and (5) the agreement must be in the best interest of the debtor. *Republic Bank of California v. Getzoff (In re Getzoff)*, 180 B.R. 572, 574 (B.A.P. 9th Cir. 1995) (*citing In re Heirholzer*, 170 B.R. 938, 940 (Bankr. N. Ohio 1994). In this case, the Agreement was not made prior to entry of discharge. The Agreement, then, is not a valid reaffirmation agreement.

If the Agreement is a redemption agreement, it is valid only if it complies with 11 U.S.C. § 722. Section 722 provides:

> An individual debtor may, whether or not the debtor has waived the right to redeem under this section; redeem tangible personal property intended primarily for personal, family, household use, from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien.

Fed.R.Bankr.P. 6008 requires that the court approve redemption agreements. There was no such approval in this case. Therefore, the Agreement is not an enforceable redemption agreement.

The plaintiffs also had the option of simply retaining the jewelry without reaffirming or redeeming the Collateral. *See Parker v. McClellan Federal Credit Union*, 139 F.3d 668 (9th Cir. 1998). To retain the Collateral, however, the plaintiffs would have had to voluntarily abide by the remaining terms of their original contract. That is, to keep the Collateral they would have had to pay the full contract price and abide by all of the contract's original terms. In the event of any breach, the defendants would be limited to repossession of the Collateral because the plaintiffs' personal liability on the original contract would have been discharged.

This may describe what happened in this case. The plaintiffs retained the jewelry and continued to pay the remaining contract price. The only difference was the monthly installment – the original installment was reduced from $100.00 to $85.00. This difference is so slight that it can be argued the plaintiffs were merely exercising their right to retain the Collateral and were not incurring a new and different liability to the defendants.[1] However, whether the reduction of $15.00 was valuable consideration or was so insignificant that it was insufficient consideration

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[1] This is particularly so when one considers that by reducing the monthly payment to $85.00 the debtors benefitted rather than burdened the defendants. The defendants were entitled to collect 22.8% interest on a more slowly dwindling principal.

for the plaintiffs' re-shouldering of their personal liability is a question that should be answered at trial.

Therefore, the plaintiffs did not reaffirm their debt nor did they redeem the Collateral. They may have simply exercised their right to retain the Collateral. This will be determined at trial.

There is a fourth possibility. As explained in *Watson v. Shandell (In re Watson)*, 192 B.R. 739, 747-48 (B.A.P. 9th Cir. 1996), *affirmed*, 116 F.3d 488 (9th Cir. 1997), the parties can enter into a post-petition agreement that is enforceable so long as the creditor gives new consideration. The panel in *Watson held*:

> The general rule concerning postpetition contracts versus reaffirmation of discharged debts is that 'the pivotal factor which serves to establish a valid post discharge contract is the existence of some separate consideration for the subsequent agreement.' *In re Getzoff*, 180 B.R. 572, 575 (9th Cir. BAP 1995) (quoting *In re Heirholzer*, 170 B.R. 938, 940 (Bankr. N.D. Ohio 1994)). Essentially, if a debtor assumes the same obligations under a new agreement as existed under a former, such a discharged debt obligation would preclude a postpetition agreement from being considered a new and separate agreement. *See Getzoff*, 180 B.R. at 574.

In words, a secured creditor and a debtor can enter into a post-petition agreement if the debtor wishes to keep the creditor's collateral even though there is no court-approved reaffirmation or redemption. In *Watson* the secured creditor had obtained relief from the automatic stay to seize the debtor's accounts. The parties then agreed that the debtor's contract liability was discharged but the

debtor would be permitted to collect the accounts on the condition that they were turned over to the creditor. After the debtor had received his bankruptcy discharge, the creditor sued the debtor because the debtor had refused to turn over the collected accounts. The creditor prevailed and was awarded a money judgment for the value of the accounts not turned over to it. The parties then returned to the bankruptcy court where the debtor argued the creditor had violated section 524 and that the post-petition agreement regarding the accounts was an invalid reaffirmation agreement.

The panel in *Watson* rejected both contentions. On the reaffirmation issue, the panel held:

> The agreement was a valid postpetition agreement for consideration separate from the original debt obligation evidenced by the promissory notes, which was discharged in bankruptcy. The agreement was a resolution of the collection of the collateral – the accounts – relieved from the automatic stay by court order.

In re Watson, 192 B.R. at 748. In other words, the creditor agreed to forebear from exercising its right to take its collateral. When the debtor later breached the agreement, it obtained a judgment for the value of its collateral. The judgment was not based upon the debtor's discharged liability under the original contract.

Nor did the creditor in *Watson* violate section 524(a). The post-petition agreement was outside the scope of section 524(a) which is limited to debts arising before the petition was filed. *In re Watson*, 192 B.R. at 748-750.

The undisputed facts in this case are amenable to similar analysis. The defendants had a lien on the Collateral.

Because the plaintiffs neither reaffirmed the debt nor redeemed the Collateral, and because they may not have voluntarily abided by the original contract and could not retain the Collateral as permitted by *Parker*, the defendants may have been within their rights to repossess the Collateral. If the plaintiffs would not voluntarily relinquish it, the defendants could have resorted to state court process to obtain the Collateral or its value.

By entering into the Agreement, the defendants agreed to forebear from exercising these rights. Their forbearance *could* be sufficient consideration to support the Agreement without running afoul with the provisions in section 524 dealing with reaffirmation agreements and the discharge injunction.

Whether the post-petition Agreement is enforceable may hinge on whether it is merely a facade for the discharged contract. For example, in *In re Brown*, 220 B.R. 101 (Bankr. C.D. Cal. 1998, *remanded*, 235 B.R. 644 (C.D. Cal. 1999), the debtor and the creditor entered into a "Post Discharge Property Retention Agreement" that permitted the debtor to retain a $760.00 necklace by paying the $460.15 contract balance. The monthly payment of $15.00 was identical to the original installment agreement but the interest rate was reduced from 22.8% to 12% per year.

This case is similar to *Brown*. In both cases, the post-petition agreement is virtually identical to the pre-petition contract. The agreement has been changed in one minor respect. In *Brown* the interest rate was slightly reduced. Here, the monthly installment was reduced. The bankruptcy court in *Brown* scoffed at the notion that the minor change was sufficient consideration for a post-petition agreement. The contract change is even more minor in this

case – the payment is slightly reduced with the result that it will take longer to pay off the debt. The defendants, however, will be well compensated for the delay – they will receive interest at the rate of 22.8%.

The bankruptcy court in *Brown* also rejected the creditor's argument that this was a valid post-petition agreement as permitted by *Watson*. This conclusion was driven by the fact that the debtor no longer had possession of the necklace. Thus, forbearing from repossessing the necklace was not adequate consideration and the court viewed the agreement as nothing more than a disguised and unenforceable reaffirmation of the discharged contract.[2]

From this record, the court cannot conclude that the defendants gave adequate consideration for the Agreement. For one thing, there is no evidence that the defendants would have ever attempted to repossess the Collateral. The plaintiffs indicate that they attempted to give back the jewelry immediately after signing the

---

[2] The bankruptcy court noted that the creditor had never attempted to repossess jewelry of such insignificant value. Based on this, forbearing from exercising the right of replevin was not adequate consideration.

On appeal, the district court remanded the matter to the bankruptcy court to determine whether the necklace had been given away by the debtor before or after the bankruptcy petition had been filed. If it had been given away before the petition had been filed, the debtor's liability for its conversion had been discharged along with the liability under the contract. Forbearing from repossessing the necklace would mean nothing. However, if the necklace was given away after the petition was filed, arguably the creditor gave adequate consideration by forbearing from filing a conversion action. *In re Brown*, 235 B.R. at 646-47.

Agreement but were told by the defendants that it was not wanted. If the defendants would have never repossessed it, forbearing from doing so was an empty gesture.

The Agreement is effectively a "financed" redemption agreement. When redeeming property, the debtor agrees to pay the creditor's "allowed secured claim." A secured claim is allowed in an amount equal to the value of the collateral in the hands of the debtor. As stated in a leading bankruptcy treatise:

> Redemption under section 722 is accomplished by the debtor paying the lienholder the amount of the allowed claim secured by the lien. Under section 506(a), the amount of the allowed secured claim of an undersecured creditor is the value of the secured party's collateral.
>
> Section 506(a) states that "such value shall be determined in light of the purpose of the valuation and of the proposed disposition for use of such property, and in conjunction with any hearing on such disposition or use."
>
> Because the purpose of section is to allow the debtor to avoid having to pay the replacement cost; i.e., the retail value of the property subject to a creditor's lien, courts have eschewed using that standard for valuation. Since a creditor would have to dispose of the item were it to be repossessed, and incur costs in that process, the wholesale value of the property best approximates the amount that the creditor will lose if the debtor is allowed to retain the property.

6 *Collier on Bankruptcy*, "Redemption," ¶ 722.05[1], p. 722-8 to 722-9 (15th rev. ed. 1997).

Were the court to give effect to a contract that required a debtor to pay more than the value of a creditor's collateral for a discharged debt, it would effectively write the protections afforded a debtor by sections 522(c)-(d) and 722 out of the Bankruptcy Code. Stated differently, if the value of the creditor's collateral is less than the principal amount that the debtor promised to pay in order to retain the collateral, the agreement is necessarily based, at least in part, on something other than the value of the collateral, or the value of the forbearance. And that "something" is the original discharged debt. *See In re Watson*, 192 B.R. at 748. This is impermissible. A debtor cannot be made to pay more than the value of the collateral absent a valid reaffirmation agreement.

Thus, the value of the Collateral is important to the resolution of this dispute. That value is in dispute.

Exhibit P to Document 55 is an appraisal by David J. Mrizek, Certified Gemologist Appraiser. He appraised the "fair market value" of the Collateral, as of July 1998, and as of February, 1999, to be $3,728.00. Mr. Mrizek states that the term "fair market value" is defined as "the price at which such property would change hands between willing buyers and willing sellers neither being under the compulsion to buy or sell, and both having reasonable knowledge of the relevant facts, in the most common market which is reasonable and realistic for a purchaser who is an ultimate consumer of the property."

This appraisal is insufficient. First, the Agreement described the Collateral as "DIAMOND RINGS AND FINE JEWELRY". The appraisal is for a diamond ring, a wedding band, a diamond pendant, a diamond bracelet,

and a diamond fashion ring. There is no evidence that the Collateral and the appraised property are one in the same.

Second, the appraiser's definition of fair market value does not fit the definition of value required for redemption as explained in the above quote from Colliers. The appraisal indicates that the retail value of the Collateral (if it is the same lot) was $3,728.00 on the date that the Agreement was executed. There is no evidence as to the wholesale value. This remains a genuine issue of material fact.

The motion for summary judgment is granted in part and denied in part. The Post Discharge Property Redemption Agreement is not a valid reaffirmation agreement. It may be a valid post-petition agreement that is supported by new consideration. But there is a genuine issue as to whether agreement was merely a retention agreement as permitted by *Parker*. There is also a genuine issue whether the value of the Collateral equals or exceeds the $3,030.35 the plaintiffs agreed to pay. If the Collateral is worth less than $3,030.35, the consideration for the post-petition Agreement is arguably insufficient. If the Agreement is not enforceable, the resulting violation of section 524(a) will not result in an award of damages to the plaintiffs.

Dated: 9 Jan. 2001

By the Court
/s/ Michael S. McManus
Michael S. McManus,
Chief Judge
United States
Bankruptcy Court

CERTIFICATE OF MAILING

I, Alan T. Kempson, in the performance of my duties as Law Clerk to the Honorable Michael S. McManus, mailed by ordinary mail the attached document to each of the following:

RONALD R. POIRIER
701 University Avenue #150
P.O. 659000
Sacramento, California 95865-9000

JOHN R. ROBERTS
2744 Coloma Street
Placerville, California 95667

JAN L. GARDNER
MURPHY, PEARSON BARDLEY & FEENER
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Sacramento, California 95865-9000

H. LEE HORNER, JR.
HORNER & HORNER
P.O. Box 41196
Sacramento, California 95841

Date: 1/9/2001

/s/ Alan T. Kempson
Alan T. Kempson

Law Clerk to Judge McManus

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re CHARLES LOPEZ and JULIE LOPEZ, Debtors.	Case No. 98-31825-A-7
	Adversary No. 99-2726
CHARLES LOPEZ and JULIE LOPEZ, Plaintiffs, vs. SAMUELS JEWELERS, INC., BANKRUPTCY RECEIVABLES MANAGEMENT, and RICHARD W. SNYDER, in his capacity as an individual, Defendants.	Date: January 8, 2001 Time: 10:00 a.m.

ORDER

(Filed Jan. 9, 2001)

For the reasons stated in the accompanying memorandum decision, the defendants' motion for summary judgment will be granted in part and denied in part.

It is ORDERED that the plaintiffs are not entitled to recover damages of any violation of the discharge injunction in 11 U.S.C. § 524. At trial, however, the court will consider whether the Post Discharge Property Retention Agreement is valid.

It is further ORDERED that the Post Discharge Property Retention Agreement is neither a valid reaffirmation agreement under 11 U.S.C. § 524 nor a valid redemption agreement under 11 U.S.C. § 722.

Dated: 9 Jan-2001

By the Court

/s/ Michael S. McManus
Michael S. McManus, Chief Judge
United State [sic] Bankruptcy Court

CERTIFICATE OF MAILING

I, Alan T. Kempson, in the performance of my duties as Law Clerk to the Honorable Michael S. McManus, mailed by ordinary mail the attached document to each of the following:

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Sacramento, California 95865-9000

H. LEE HORNER, JR.
HORNER & HORNER
P.O. Box 41196
Sacramento, California 95841

Date: Jan. 9, 2001

/s/ Alan T. Kemson
Alan T. Kemson
Law Clerk to Judge McManus

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
(Sacramento Division)

In re: CHARLES/JULIE LOPEZ, Debtors.	Case No. 98-31825-A-7
CHARLES/JULIE LOPEZ, Plaintiffs, V. SAMUELS JEWELERS, INC., BANKRUPTCY RECEIVABLES MANAGEMENT, and RICHARD W. SNYDER, an individual, Defendants.	Adversary No. 99-2726 Motion Control No. MEE #1 Submitted: February 7, 2000
BANKRUPTCY RECEIVABLES MANAGEMENT, Counter Claimant V. CHARLES/JULIE LOPEZ and DOES 1 through 10, Counter Defendants.	

(Filed Mar. 14, 2000)

John R. Roberts, Esq., John R. Roberts, A Professional Corporation, Placerville, California, for Debtors/Plaintiffs/ Counter Defendants, Charles and Julie Lopez;

Mark E. Ellis, Esq., Jan L. Gardiner, Esq., Murphy, Pearson, Bradley & Feeney, Sacramento, California, for Defendant/Counter Claimant, Bankruptcy Receivables Management.

MEMORANDUM OF DECISION

This matter is before the court on Defendant/Counter Claimant, Bankruptcy Receivables Management's ("BRM") Motion to Dismiss this adversary proceeding (the "Motion"). BRM brings this Motion pursuant to Federal Rule of Bankruptcy Procedure 7012(b). For the reasons set forth below, BRM's Motion is **GRANTED IN PART and DENIED IN PART**.

FACTUAL BACKGROUND

On July 30, 1998, Debtors Charles and Julie Lopez (the "Debtors") filed a petition for relief under Chapter 7 of the Bankruptcy Code.[1] On November 5, 1998, following the Chapter 7 Trustee's Report of no Distribution, Debtors received a discharge. On December 1, 1998, this court entered an order closing the case.

Prior to filing Chapter 7, Debtors had purchased a diamond ring and other jewelry (the "Collateral") from Samuels Jewelers ("Samuels") in the amount of $5,623.01. Samuels was listed as a secured creditor in Debtors' schedules and the debt was subsequently discharged in

[1] Unless otherwise indicated, all references to "Code," "Chapter," and "Section/§," are to the provisions of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101, *et seq*..

the bankruptcy. In February 1999, following Debtors' discharge, Samuels sent Debtors a "Post Discharge Property Retention Agreement" (the "Agreement"). The Agreement provided that Debtors could retain the Collateral in exchange for Debtors' agreement to pay a principal amount of $3030.35, plus interest at an annual rate of 22.80%. Under the Agreement, Debtors were required to make monthly payments of $85.00, until the principal and interest were paid in full. The Agreement provided that it was "not a Reaffirmation Agreement," thus was not subject to § 524(c). Debtors signed the Agreement on February 27, 1999.

On November 11, 1999, this court granted Debtors' Motion to Reopen Case to File a Complaint. On December 3, 1999, Debtors filed a Complaint (the "Complaint") against Samuels, BRM, as an agent of Samuels, and Richard W. Snyder, as an agent of Samuels (collectively, "Defendants"). The Complaint alleged that: 1) Defendants violated the discharge order by having Debtors sign the Agreement; 2) Defendants committed fraud by representing to Debtors that the jewelry was worth $3,030.35, when it was worth considerably less; 3) Defendants exerted undue influence over Debtor in getting Debtors to sign the Agreement, even though Debtors were represented by counsel and Defendants knew this; and 4) Defendants acted with malice and with the knowledge that they [sic] actions would produce fear and suffering in Debtors.

On January 11, 2000, Defendants Samuels and BRM filed the current Motion to dismiss Debtors' Complaint.[2] Defendants allege that: 1) Debtors' cause of action for violation of the discharge order is legally insufficient and cannot be maintained; 2) Debtors have failed to plead and cannot prove a cause of action for fraud; 3) Debtors have failed to state a claim upon which relief can be granted because undue influence is not a legally cognizable cause of action; and 4) Debtors have failed to state a claim upon which relief can be granted because malice is not a legally cognizable cause of action.

DISCUSSION

I. Bankruptcy Rule 7012(b)

Motions to dismiss are governed by Federal Rule of Civil Procedure 12(b)(6), made applicable by Bankruptcy Rule 7012(b). Federal Rule of Civil Procedure 12(b)(6) provides in pertinent part,

> Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . .

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[2] Concurrently, Defendant BRM filed a Counter Claim against Debtors. In the Counter Claim, BRM alleges that the Agreement was a valid contract, which Debtors breached and that Debtors converted the Collateral. BRM also requested that the court issue a declaratory judgment stating that the Debtors have an obligation to BRM under the Agreement. Finally, BRM requested attorney fees and costs.

A complaint should not be dismissed under Fed. R. Civ. Pro. 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Further, "[d]ismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri*, 901 F.2d at 699 (citing *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984)). Defendants argue that all four of Debtors' causes of action should be dismissed under Fed. R. Civ. Pro. 12(b)(6). We find that Debtors' cause of action for violation of the discharge order states a claim under which relief can be granted, and thus decline to dismiss this cause of action. We also find that Debtors' causes of action for fraud, undue influence, and malice, as written, do not state claims under which relief can be granted, thus are dismissed with leave to amend.

II. Violation of Discharge Order

Defendants argue that this court should dismiss Debtors' first cause of action for violation of the discharge order because Defendants "are not prevented from post-discharge enforcement of a valid lien on property of the debtor that existed at the time of entry of the order for relief . . . " Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss Complaint, 2:16-18. Debtors respond by alleging that the Agreement is an improper reaffirmation of a discharged pre-petition debt, thus is unenforceable. Because the case law is not settled as to whether this type of agreement is enforceable or an unenforceable reaffirmation agreement, we find that

Plaintiffs have stated a claim under which relief may be granted, thus dismissal pursuant to Fed. R. Civ. Pro. 12(b)(6) is not appropriate.

A. Reaffirmation Agreements

A debtor may enter into a reaffirmation agreement with a creditor to reaffirm an otherwise dischargeable debt. However, the agreement is only binding if it is made pursuant to the guidelines set forth in § 524(c). Among other requirements, § 524(c)(1) provides that

> An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if –
>
> > (1) such agreement was made before the granting of the discharge under section 727 . . .

If no such agreement is made prior to discharge, most courts agree that a secured creditor may enforce a valid pre-petition lien after discharge. *In re Watson*, 192 B.R. 739, 749 (9th Cir. B.A.P. 1996); *In re Fernandez-Lopez*, 37 B.R. 664, 669 (9th Cir. B.A.P. 1994) (citing *In re Dickinson*, 24 B.R. 547, 550 (Bankr. S.D. Cal. 1982)). Further, § 524(f) provides that "[n]othing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt." Thus, a debtor can reaffirm prior to discharge, a creditor can enforce a lien on property following discharge, or a debtor can voluntarily pay the debt to the creditor.

Here, it is undisputed that Debtors and Defendants entered into the Agreement after Debtors received their discharge. Thus, as the court found at the hearing on the Motion, the Agreement cannot be a reaffirmation agreement as contemplated under § 524(c). Therefore, the question for this court is whether Debtors have pled a cause of action that states a claim under which relief can be granted. We believe that they have.

An examination of the cases in the various circuits reveals that "the pivotal factor which serves to establish a valid post discharge contract is the existence of some separate consideration for the subsequent agreement." *In re Getzoff*, 180 B.R. 572, 575 (9th Cir. B.A.P. 1995) (citations omitted); *In re Heirholzer*, 170 B.R. 938, 940 (Bankr. N.D. Ohio 1994) (citing *In re Artzt*, 145 B.R. 866 (Bankr. E.D. Tex. 1992)). Further, the consideration referred to in § 524(c) is consideration given by the debtor; namely, the discharged debt, and not any prepetition consideration give [sic] by the creditor. *In re Getzoff*, 180 B.R. at 575; *In re Knight*, 211 B.R. 747, 750 (Bankr. D. Or. 1997). Thus, "a creditor who enters into a postpetition contract or lease which obligates the debtor under similar terms to those which existed under a prebankruptcy agreement, without observing the reaffirmation rules of [§ 524(c)] . . . may find itself in violation of the permanent postbankruptcy injunction of § 524(a)[3]." *In re Knight*, 211 B.R. at 750.

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[3] Section 524(a) provides, in pertinent part, that

A discharge in a case under this title –

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727 . . . ;

(Continued on following page)

While the courts agree that separate post discharge consideration is required by the creditor, there is no agreement between the circuits as to what constitutes the "separate consideration" necessary for a valid post discharge contract.

Some courts have found sufficient consideration and have upheld the validity of postpetition debts where the debtor contracts to prevent creditor from enforcing its lien on the property or debt. *See, In re Heirholzer*, 170 B.R. 938 (holding that a debtor's "decision to forego foreclosure [on real property by a creditor on a pre-petition lien] represents new and sufficient consideration to support a binding post-discharge obligation." *Id.* at 941); *In re Petersen*, 110 B.R. 946 (Bankr. D. Colo. 1990) (holding that there is sufficient consideration to constitute a valid post-petition obligation where: 1) an informed Chapter 7 debtor elects, post-petition, to adopt and continue a pre-petition lease agreement rejected by the trustee; 2) the debtor acted with assistance or access to his counsel; 3) the lease was not in default; and 4) the debtor complied with and performed pursuant to provisions of the new lease for almost two years); *In re Button*, 18 B.R. 171 (Bankr. W.D.N.Y. 1982) (holding that there was sufficient consideration to constitute a new postpetition debt where debtor violated his probation and executed a promissory note with creditor to substitute a civil enforcement mechanism for the criminal process).

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(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor. . . .

On the other hand, various courts have held that there is no new consideration where the terms of the alleged postpetition contract are essentially the same as the terms of the contract on the discharged debt. *See, In re Watson*, 192 B.R. at 747 (noting that "if a debtor assumes the same obligations under a new agreement as existed under a former, such a discharged debt obligation would preclude a postpetition agreement from being considered a new and separate agreement." *Id.* (citations omitted)); *In re Getzoff*, 180 B.R. at 574 (holding that a second note was simply an extension of the first note, thus required compliance with § 524(c)); *In re Brown*, 220 B.R. 101, 105-06 (Bankr. C.D. Cal. 1998) (holding that new obligations that are essentially the same as discharged obligations, except for a slight reduction in interest rate, are subject to § 524(c)), *remanded for clarification on other issues*, 235 B.R. 644 (C.D. Cal. 1999); *In re Artzt*, 145 B.R. at 869 (holding that a debt was subject to § 524(c) where "[a]ll relevant terms and amounts are the same; even the collateral is the same." *Id.*).

While it would be premature to determine the outcome of this case, we cannot say that "it appears beyond doubt that [Debtors] can prove no set of facts in support of the claim which would entitle [them] to relief." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987) (quoting *Conley*, 355 U.S. at 45-46). Clearly there are situations where courts have found a valid post-discharge obligation. There are also situations where courts have found invalid attempts at reaffirmation agreements. If the courts cannot come to a consensus after hearing evidence in the respective cases, we cannot do so without hearing any evidence at all. Therefore, we decline to dismiss

Debtors' cause of action for violation of the discharge order.

III. Fraud

Under California law, fraud consists of misrepresentation with knowledge and intent, justifiable reliance, and resulting injury. B. Witkin, 5 Summary of California Law: Torts § 676 (9th ed. 1988). Although Federal Rule of Civil Procedure 8(a)(2) requires that a pleading set forth a "short and plain statement of the claim showing that the pleader is entitled to relief," Federal Rule of Civil Procedure 9(b), made applicable by Bankruptcy Rule 7009, requires more. Federal Rule of Civil Procedure 9(b) provides that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Defendants argue that Debtors' cause of action for fraud should be dismissed pursuant to Fed. R. Civ. Pro. 9(b) because Debtors have failed to plead with particularity. While we agree that Debtors' fraud allegations are deficient, we do not agree that the fraud action should be dismissed. Rather, it should be dismissed only after Debtors have had an opportunity to amend their pleadings.

Federal Rule of Civil Procedure 9(b) requires more than "mere conclusory allegations of fraud." *Anspach v. Bestline Products, Inc.*, 382 F. Supp. 1083, 1090 (N.D. Cal. 1974) (citing *Segal v. Gordon*, 467 F.2d 602 (2nd Cir. 1972); *Shemtob v. Shearson, Hammill and Co.*, 448 F.2d 442, 444 (2nd Cir. 1971)). To satisfy Fed. R. Civ. Pro. 9(b), "a plaintiff must set forth more than the neutral facts

necessary to identify the transaction. The plaintiff must set forth what is false or misleading about a statement, and why it is false." *Cooper v. Pickett*, 137 F.3d 616 (9th Cir. 1998). Thus, "a plaintiff must plead with particularity the time, place and nature of the fraud." *Employers Ins. of Wausau v. Musick, Peeler & Garrett*, 871 F. Supp. 381, 390 (S.D. Cal. 1994) (citing *Wool v. Tandem Computers Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987)); *U.S. Concord, Inc. v. Harris Graphics Corp.*, 757 F. Supp. 1053, 1056 (N.D. Cal. 1991) (citing *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985)).

In *Luce v. Edelstein*, 802 F.2d 49 (2nd Cir. 1986), the plaintiff alleged that "defendants made oral and written misrepresentations of their net worth and their ability to make the partnership business successful." *Id.* at 54. The court held that the plaintiff's allegations of fraud were not specific enough, and noted that "such allegations, which fail to specify the time, place, speaker, and sometimes even the content of the alleged misrepresentations, lack the 'particulars' required by Rule 9(b)." *Id.* (citations omitted).

In *U.S. Concord, Inc.*, the plaintiff alleged that the defendant "made several oral representations to [plaintiff] that the printing press was the 'workhorse of the industry' and known for its speed and quality." *U.S. Concord, Inc.*, 802 F.2d at 1056. The court held that the pleading was not specific enough and noted that "although plaintiff specifie[d] the contents of the purported misrepresentations, it fails to allege their time and place. Allegations such as 'during the course of discussions in 1986 and 1987,' and 'May 1987 and thereafter' do not make the grade." *Id.* at 1056-57.

Here, Plaintiffs summarily allege that Defendants committed fraud. Plaintiffs allege that "at all times the defendants represented to the plaintiffs that the fair market value of the jewelry was $3,030.35,. . . . [when, in fact,] the fair market value of the jewelry was considerably less . . . " Plaintiff's Complaint, p. 3, ¶¶ 24-25. This pleading is insufficient. We find, as the *Luce* court did, that "at all times" is not specific enough as to the timing of the purportedly fraudulent misrepresentations. Further, Plaintiffs have not given the court any support for the proposition that the Collateral was worth "considerably less," nor have they given us a value to dispute Defendant's valuation. Thus, Plaintiffs have not pled fraud with particularity sufficient to satisfy Federal Rule of Civil Procedure 9(b) and this cause of action shall be dismissed.

IV. Undue Influence

Undue influence is generally regarded as an affirmative defense. *Snyder v. Rosenbaum*, 215 U.S. 261 (1909). Undue influence is also recognized as a ground for recission [sic] of a contract when recission [sic] is requested as a remedy. However, because an affirmative defense is not appropriate in a complaint, and Debtors have not requested recission [sic] of the Agreement in their prayer for relief, this "cause of action" shall be dismissed.

Further, even if Debtors had requested recission [sic] as a remedy, a general allegation of the ultimate fact of undue influence is not sufficient. *Odorizzi v. Bloomfield School Dist.*, 246 Cal. App. 2d 123 (1966); *Krug v. Meehan*, 109 Cal. App. 2d 274, 276-77 (1952). Instead, Debtors must allege facts that bring their case within one of the two classes of undue influence: 1) advantage taken of a

confidential relationship; or 2) advantage taken of a weakness of mind, necessities, or distress, by one not in a confidential relationship. *Odorizzi*, 246 Cal. App. 2d at 130-31; *Krug*, 109 Cal. App. 2d at 276.

Here, Debtors failed to request recission [sic] as a remedy, and also failed to allege facts that would bring their case within one of the two classes. Therefore, we dismiss Debtors' cause of action for undue influence.

V. Malice

Malice must be pled to recover punitive damages, B. Witkin, California Procedure § 868 (4th ed. 1997). However, while it is an element of other causes of action, it is basically no more than a state of mind, and is not a cause of action in and of itself. Here, Debtors have requested punitive damages in their prayer for relief. We assume, without deciding, that Debtors included the malice "cause of action" as support for their punitive damages prayer. However, we find no authority for sustaining a cause of action based solely on malice. Malice is better suited as an element of Debtors' fraud cause of action, and as support for the punitive damages prayer.

Although malice can be averred generally, it must be properly pled by alleging the wrongful motive, intent, or objectionable legal conclusion. 5 B.E. Witkin, California Procedure §868 (4th ed. 1997). Even if Debtors had included malice as an element of their fraud cause of action, they failed to provide sufficient facts to allege a wrongful motive, intent, or objectionable legal conclusion. Therefore, because Debtors have failed to properly set forth a claim for malice, this "cause of action" shall be dismissed.

VI. Dismissal Without Prejudice

While we find that the "causes of action" for undue influence and malice should be dismissed, we do so without prejudice and give Debtors leave to amend the Complaint to include malice and undue influence as elements of their other causes of action. Various courts have held that a plaintiff should be permitted to amend the complaint under Fed. R. Civ. Pro. 15, made applicable by Rule 7015, if no bad faith or undue burden to the defendant is shown. *Luce*, 802 F.2d at 56 (citing *Yoder v. Orthomolecular Nutrition Inst., Inc.*, 751 F.2d 555, 562 (2nd Cir. 1985); *In re Kubick*, 171 B.R. 658, 660 (9th Cir. B.A.P. 1994); *In re Englander*, 92 B.R. 425, 427 (9th Cir. B.A.P. 1988); *In re Jenkin*, 83 B.R. 733, 735 (9th Cir. B.A.P. 1988). Amendment of an insufficient complaint is "predicated on the standard that a motion to dismiss should not be granted unless it appears **beyond a doubt** that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *In re Kubick*, 171 B.R. at 660 (citing *Conley v. Gibson*, 355 U.S. at 45-46 (emphasis added). We cannot say without a doubt, that Debtors can prove no set of facts in support of the claims in their Complaint. Thus, we dismiss Debtors' causes of action for fraud, undue influence and malice without prejudice and grant Debtors thirty (30) days to amend their Complaint.

CONCLUSION

Based on the foregoing reasoning, BRM's Motion to Dismiss is DENIED IN PART and GRANTED IN PART. BRM's Motion is DENIED as to the first cause of action for Violation of the Discharge Order. BRM's Motion is GRANTED as to the causes of action for Fraud, Undue Influence and Malice. These causes of action are dismissed

without prejudice and Debtors are granted thirty (30) days from the date of this memorandum to amend their Complaint. This memorandum constitutes the court's findings of fact and conclusions of law. An appropriate order shall issue.

Dated: **MAR 11 2000**

/s/ **DAVID E. RUSSELL**
DAVID E. RUSSELL
CHIEF BANKRUPTCY JUDGE

160 F.3d 843

United States Court of Appeals,
First Circuit.

In re James E. BURR and Katherine A. Burr, Debtors.
BANK OF BOSTON, Appellant,

v.

James E. BURR and Katherine A. Burr, Appellees.

No. 98-9007.

Heard Oct. 8, 1998.
Decided Nov. 25, 1998.

Matthew J. McGowan with whom Salter McGowan Swartz & Sylvia was on brief for appellants.

Joel F. Soforenko for appellees.

John Rao on brief for National Consumer Law Center, Inc., amicus curiae.

Before STAHL, Circuit Judge, LIPEZ, Circuit Judge, and REAVLEY,* Senior Circuit Judge.

STAHL, Circuit Judge.

This appeal presents a question of statutory interpretation that has divided the circuits: under 11 U.S.C. § 521(2), must debtors in chapter 7 proceedings simply state whether they intend to retain or surrender property of the estate that is collateral for a consumer debt, or (if they intend to retain the property) must they also elect and perform one of three retention options specified in the statute? The bankruptcy court held that chapter 7 debtors wishing to retain property of this nature

* Of the Fifth Circuit, sitting by designation.

wishing to retain property of this nature need not elect or perform any of the specified retention options, and the bankruptcy appellate panel ("BAP") affirmed, albeit on a somewhat different basis. We reverse.

I.

On October 25, 1996, James and Katherine Burr filed a chapter 7 petition. At the time of their filing, the Burrs owed First National Bank of Boston (now BankBoston and hereafter "the Bank") approximately $8,000 on a consumer loan secured by a 1993 Pontiac minivan. The debtors' payments under the loan agreement were current, but the agreement provided that the filing of a bankruptcy petition would constitute an event of default.

On February 18, 1997, the Bank filed a motion to compel the debtors to elect and perform one of three courses of conduct: (1) reaffirm their debt under the terms of the original loan agreement (thus giving the bank recourse against them in the event of a default post-discharge); (2) surrender the minivan; or (3) redeem the minivan by paying the bank a lump sum corresponding to the minivan's value. The motion also set forth an alternative request that, in the event the debtors should decline to reaffirm the debt or to surrender or redeem the minivan, the Bank be relieved from the automatic stay prescribed by 11 U.S.C. § 362 so that it might foreclose on its collateral in state court.

In support of its motion, the Bank argued that it was entitled to relief under the plain language of 11 U.S.C. § 521(2), which provides:

> [I]f an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by the property of the estate –
>
> (A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;
>
> (B) within forty-five days after the filing of a notice of intent under this section, or within such additional time as the court, for cause, within such forty-five day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and
>
> (C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title. . . .

Debtors opposed the Bank's motion and asserted an entitlement under the Bankruptcy Code to retain the minivan without performing the retention-related options specified in § 521(2)(A), so long as their payments remained current under the original loan agreement.

On February 25, 1997, the bankruptcy court (Queenan, J.) tacitly rejected the Bank's claimed entitlement to surrender, redemption, or reaffirmation (all agree that the minivan is ineligible for exemption and avoidance of the Bank's security interest) by entering an endorsed

order requiring only that "the Debtors . . . file a statement indicating whether they intend to retain or surrender the collateral." This order (which did not address the Bank's alternative request for relief from the stay) was consistent with Judge Queenan's published opinion in *In re Ogando,* 203 B.R. 14 (Bkrtcy.D.Mass.1996), where he had (1) held that 11 U.S.C. § 521(2) requires nothing more from a debtor than a statement specifying "his intention either to retain or surrender the collateral," *id.* at 17, and (2) indicated that a chapter 7 debtor may, as a "fourth option," retain the collateral simply by remaining current on the payments under the original loan agreement, *see id.* The reasoning of *In re Ogando* mirrors, in all relevant respects, the views of the Second, Fourth, Ninth, and Tenth Circuits. *See In re Boodrow,* 126 F.3d 43, 53 (2d Cir.1997), *cert. denied,* 522 U.S. 1117, 118 S.Ct. 1055, 140 L.Ed.2d 118 (1998); *In re Belanger,* 962 F.2d 345, 347-48 (4th Cir.1992); *In re Parker,* 139 F.3d 668, 672-73 (9th Cir.1998), *cert. denied,* 525 U.S. 1041, 119 S.Ct. 592, 142 L.Ed.2d 535, 67 U.S.L.W. 3284 (1998) (No. 98-618); and *Lowry Fed. Credit Union v. West,* 882 F.2d 1543, 1546-47 (10th Cir.1989); *see also* 4 *Collier on Bankruptcy,* ¶ 521.10 (15th ed. rev.1998) (endorsing the reasoning of these courts). But it has been rejected by the Fifth, Seventh, and Eleventh Circuits, which hold that a chapter 7 debtor wishing to retain collateral securing a consumer debt must elect and then perform one of the retention options specified in § 521(2)(A). *See In re Johnson,* 89 F.3d 249, 250-52 (5th Cir.1996) (per curiam); *In re Edwards,* 901 F.2d 1383, 1385-87 (7th Cir.1990); and *In re Taylor,* 3 F.3d 1512, 1516-17 (11th Cir.1993).

The BAP affirmed, although it disapproved of the bankruptcy court's tacit ruling that a chapter 7 debtor

may retain the collateral post-discharge simply by continuing to make payments under the original loan agreement. *See In re Burr,* 218 B.R. 267, 271-73 (1st Cir.BAP1998). Instead, it followed the approach sketched in *In re Mayton,* 208 B.R. 61 (9th Cir.BAP1997), where, in a case preceding *In re Parker,* a Ninth Circuit BAP held (1) that debtors in the circumstances just described need only specify whether they intend to surrender or retain the collateral, *see* 208 B.R. at 66-68; but (2) when the automatic stay of 11 U.S.C. § 362 expires upon discharge, secured creditors may foreclose on the collateral (so long as the bankruptcy was an event of default), *see id. See In re Burr,* 218 B.R. at 272-73. This appeal followed.

II.

We set to one side the dispute over whether debtors may retain the collateral post-discharge if they remain current on their payments under the original loan agreement, and begin by noting that courts deciding whether the list of retention options specified in 11 U.S.C. § 521(2)(A) is exhaustive have interpreted the statute in one of the three ways. The first interpretation – that the plain language of § 521(2) contemplates retention options beyond those specified in § 521(2)(A) – is most forcefully articulated in *In re Parker.* There, the Ninth Circuit construed § 521(2)(A) to require only the filing of a statement of intention. *See* 139 F.3d at 673 ("[T]he only mandatory act is the filing of the statement of intention, which the debtor 'shall' file.").

> Then, "if applicable," – that is, if the debtor plans to choose any of the three options listed later in the statute (claiming the property as exempt, redeeming the property, or reaffirming the debt) – the debtor

> must so specify in the statement of intention. The debtor's other options remain available, as unambiguously stated in § 521(2)(C): "[N]othing in subparagraph[ ] (A) . . . shall alter the debtor's or the trustee's rights with regard to such property under this title."

Id.

The second interpretation – that 11 U.S.C. § 521(2), taken as a whole, is ambiguous – begins with the proposition, stated in the opinion of the BAP, that § 521(2)(A) mandates election of one the specified retention options and that § 521(2)(B) directs performance of the elected option:

> Section 521(2) certainly requires the debtor to do certain things. It mandates, *inter alia,* that: (1) "the debtor *shall* file with the clerk a statement of his intention"; and (2) "within forty-five days after the filing of the notice of intent . . . the debtor *shall* perform his intention." 11 U.S.C. § 521(2)(A) and (B) (emphasis added). Putting § 521(2)(C) aside, the language of § 521(2)(A) and (B) is unambiguous.

In re Burr, 218 B.R. at 271. By focusing on § 521(2)(B)'s requirement that the debtor's intention be performed within forty-five days, the BAP thus rejected the view, exemplified by *In re Parker,* that the statute unambiguously contemplates options beyond those listed in § 521(2)(A). In the BAP's view, if the stated intention need be performed within forty-five days, the retain-and-keep-current option (which is not capable of "performance" within forty-five days) simply cannot be said to have been plainly within the contemplation of Congress. *See* 218 B.R. at 271-73.

Yet the BAP saw 11 U.S.C. § 521(2)(C), which provides that "nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title," as raising questions whether the unambiguous requirements of § 521(2)(A) and (B) are enforceable. *See id.* at 271. Specifically, the BAP was concerned that reading § 521(2)(A) as setting forth exclusive retention options would undermine § 521(2)(C)'s directive that the statute not be read to diminish rights otherwise available to debtors under the Bankruptcy Code. *See id.* at 272. For instance,

> it is at least conceivable, if unlikely, that a collateralized loan within [11 U.S.C.] § 101(8)'s definition of "consumer debt" might lack an ipso facto clause [making the filing of a bankruptcy petition an event of default] or be nonrecourse. If such were the case, dictating redemption, reaffirmation or surrender as *exclusive* options could effect a substantive alteration of the parties' rights.

Id.

The BAP continued:

> Moreover, redemption pursuant to 11 U.S.C. §§ 522(f) and 722, and reaffirmation pursuant to § 524(c) et seq. are voluntary procedures. *Requiring* the debtor to do either would also violate § 521(2)(C). Additionally, compelling the surrender of collateral when the debtor fails to perform his or her duties under § 521(2)(A) or (B) causes a similar problem in light of the automatic stay's independent protection.

Id. (citations omitted). This perceived incompatibility between the requirements of § 521(2)(A) and (B) and rights debtors otherwise hold led the BAP, acting pursuant to § 521(2)(C), to decline to enforce these requirements:

"[W]e conclude that the bankruptcy court did not err in ordering that the debtors declare whether they intended to retain or surrender the collateral – and nothing more." *Id.* at 273.

The final interpretation – that the language of 11 U.S.C. § 521(2) unambiguously requires a debtor retaining collateral which secures consumer debt to elect and then perform one of the retention options specified in § 521(2)(A) – is elaborated by Judge Shadur in his dissenting opinion in *In re Boodrow.* The essence of this position is that the words "if applicable," as used in § 521(2)(A) ("the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, *if applicable,* specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm the debts secured by such property") (emphasis added), should not be understood to mean that a debtor need list one of the three later-specified retention options only if he or she is electing it from the panoply of options (some stated; others not) available to chapter 7 debtors. *See id.* at 57-59 (Shadur, J., dissenting). Rather, the words "if applicable" should be understood to mean that if retention is selected from the two general options available (retention or surrender), then the debtor must specify one of the three listed retention options. *See id.* As Judge Shadur put it:

> [A] reading of the "if applicable" phrase . . . to connote the existence of an unexpressed "fourth option" . . . demands an inordinately awkward use of the statutory language. That construction reads the statute both (1) as though Congress had said that the statutorily identified options of exemption, redemption, or

> reaffirmation would be the only ones available solely if the debtor decides that one of those "is applicable" (something Congress certainly did not say) and (2) as though Congress had also said (as it also certainly did not) that some alternative other than those three choices was available if the debtor decided on such other alternative. By contrast, it is perfectly conventional usage – and perfectly good English – for someone to employ the "if applicable" language in the statute as a shorthand way of calling for a choice between A and B and, only if B "is applicable," then a further choice among subsets of B.

Id. at 59.

Judge Shadur bolstered his reading of the statute with a number of additional observations. Echoing the point emphasized by the BAP in this case, he first noted that 11 U.S.C. § 521(2)(B)'s mandate of performance of the elected retention option within forty-five days "is totally at odds with any concept of Congress having contemplated a 'fourth option' involving a continued and extended payout schedule that would run the length of the underlying consumer debt contract – a period of many months (or years) in most cases." *Id.* He next stated that "the absence from the Bankruptcy Code of any provision that would expressly permit the 'fourth option,'" *id.* at 60, in combination with the fact that, at the time § 521(2) was enacted, at least three courts had held that a chapter 7 debtor had no right to continue performance under a secured consumer debt contract absent creditor-approved reaffirmation, *see id.* at 59-60, all but compels the conclusion that the qualifying language of § 521(2)(C) is "perfectly consistent" with "limiting a Chapter 7 debtor to the three options expressly articulated in Section 521(2)(A)," *id.* at 59.

Along these same lines, Judge Shadur also pointed out that it would be the rare debtor indeed who would elect reaffirmation or redemption over the unstated fourth option, which neither requires a large lump sum payment (redemption) nor resuscitates personal liability for the underlying debt post-discharge (reaffirmation). *See id.* at 60. Why, then, would Congress specify the seldom-to-be-used devices of redemption and reaffirmation, but leave unspecified the option that would be almost universally employed? *See id.* Judge Shadur concluded by noting that, in the context of chapter 13 of the Bankruptcy Code, Congress explicitly provided for a "cram down" provision by which a debtor may retain property over the objection of a secured creditor by keeping current on his or her payments. *See id.* at 60-61. This, of course, strongly suggests that it would be improper to infer congressional approval of a similar "cram down" option in the present context: "[W]hen Congress wants to provide for a 'cram down' that enables a debtor to keep property over the objection of a secured creditor, it knows full well how to do so." *Id.* at 60.

III.

The appellate positions of the parties are not surprising. The Bank urges us to follow the approach of Judge Shadur and the Fifth, Seventh, and Eleventh Circuits and to declare the retention options set forth in 11 U.S.C. § 521(2)(A) both unambiguously exhaustive and enforceable. Debtors, ably assisted by amicus curiae the National Association of Consumer Bankruptcy Attorneys, counter with alternative arguments: section 521(2) either unambiguously countenances unstated retention options beyond those specified in § 521(2)(A) (per the Ninth Circuit), or it

is ambiguous (for the reasons stated by the BAP in this case) and must, because of the "fresh start" policy underlying the Bankruptcy Code, be interpreted to allow for the unspecified, fourth, retain-and-keep-current option (per the Second, Fourth, and Tenth Circuits). We are persuaded by the Bank's argument.

As an initial matter, we reject the claim that 11 U.S.C. § 521(2) unambiguously contemplates retention options other than those specified in the statute. For one thing, the only non-specified retention option posited by the debtors is the retain-and-keep-current option, and that option is not, as many courts have recognized, capable of performance within forty-five days of the filing of the statement of intention, as § 521(2)(B) requires. *See, e.g., In re Boodrow,* 126 F.3d at 59 (Shadur, J., dissenting); *In re Taylor,* 3 F.3d at 1516. For another, we completely agree with Judge Shadur, for the reasons he sets forth, that it would be "inordinately awkward" to read § 521(2)(A) as connoting the existence of at least one, unspecified, fourth option. *See In re Boodrow,* 126 F.3d at 59 (Shadur, J., dissenting). We also agree that it is perfectly conventional usage, and perfectly good English, for Congress to have phrased § 521(2)(A) in the way it did because it intended chapter 7 debtors to elect surrender or retention, and then, "if" retention is "applicable," to specify which of the following three retention options they intend to employ. *See id.* In so ruling, we reject the debtors' argument that the reading we adopt renders the words "if applicable" redundant. *See In re Belanger,* 962 F.2d at 348. While the point might be obvious, the phrase "if applicable" makes completely explicit that, in the event of a surrender of collateral, exemption, reaffirmation, and redemption will have no application.

We are left, then, to consider whether 11 U.S.C. § 521(2)(C) should cause us to decline to enforce the directives of § 521(2)(A) and (B). Following the lead of the BAP below, debtors and amicus suggest that enforcing these directives would deprive debtors of rights they otherwise enjoy, in contravention of § 521(2)(C). We disagree. Section 521(2)(C) merely acts to make supreme over the directives of § 521(2)(A) and (B) rights conferred upon the trustee and debtor *elsewhere in the Bankruptcy Code. See id.* ("[N]othing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights . . . *under this title* . . . . ") (emphasis supplied). When this is properly understood, any appearance of self-contradiction evaporates. Chapter 7 debtors do not, of course, enjoy a freestanding right under the Bankruptcy Code to retain property securing a consumer debt merely by keeping current on their payments under old loan agreements. Nor do they maintain a freestanding right under the Code to maintain with their secured creditors advantageous arrangements in place prior to filing. For this reason, we see as beside the point the BAP's concern that giving effect to § 521(2)(A) and (B) might alter the rights of those extraordinarily rare debtors with consumer loan agreements that are either nonrecourse or that lack ipso facto clauses. After all, any such rights altered by operation of the directives of § 521(2)(A) and (B) do not derive from the Bankruptcy Code; they are enforceable only under state law. And the loss of such state law rights is one of the costs of a chapter 7 discharge.

Nor do we see a contradiction between 11 U.S.C. § 521(2)(C) and either the voluntary nature of redemption and reaffirmation or the automatic stay of 11 U.S.C. § 362. We do not doubt that redemption is beyond the means of

most chapter 7 debtors, and that chapter 7 debtors wishing to retain consumer goods on which they owe money will, as a practical matter, be compelled to enter into reaffirmation agreements with their secured creditors. Nor do we doubt that some oversecured creditors may use their superior bargaining power to attempt to impose additional, creditor-friendly terms in any new agreement. But strictly speaking, debtors are never "forced" to enter into reaffirmation agreements; they can always surrender the property and be discharged of the underlying debt. Or, rather than filing for chapter 7 protection, debtors can petition to reorganize under chapter 13 and take advantage of the cram down provision available to chapter 13 petitioners. *See* 11 U.S.C. § 1325(a)(5)(B). Again, we emphasize that a chapter 7 discharge is a benefit that comes with certain costs.

With respect to the perceived contradiction between "involuntary" surrender and the automatic stay, we perhaps would have cause for concern if, in fact, the effect of 11 U.S.C. § 521(2) were that most debtors were forced to surrender their collateral. But as amicus itself recognizes, the fact is that most secured creditors in circumstances such as these will prefer to enter reaffirmation agreements containing identical terms to the old agreements over the costs associated with accepting back, and then disposing of, surrendered collateral. *See* Amicus Brief at 19-22 (acknowledging the incentives most creditors have to enter reaffirmation agreements). Moreover, one court has supportably concluded that a chapter 7 debtor complies with 11 U.S.C. § 521(2)(A) and (B), and therefore is entitled to retain the property in question, simply by offering to reaffirm under the old contractual terms, attempting in good faith to negotiate a reaffirmation agreement with the

creditor, and taking all steps otherwise necessary to reaffirm a debt under § 524. *See In re French,* 185 B.R. 910, 914 (Bkrtcy.M.D.Fla.1995); *but cf., e.g., In re Turner,* 156 F.3d 713, 718-21 (7th Cir.1998) (chapter 7 debtors' unilateral statements of reaffirmation, filed without notice to or the consent of creditors, were not valid reaffirmation agreements under § 521(2)(A)). We need not and do not decide whether *In re French* was correctly decided; we only observe that the regime unambiguously prescribed by § 521(2)(A) and (B) does not so clearly undermine a chapter 7 debtor's other Code-conferred rights as to be unenforceable.

We conclude with two miscellaneous points responsive to arguments made in the parties' briefs. First, we are distinctly unimpressed with the tentative and unelaborated suggestion of amicus that 11 U.S.C. § 521(2)(A)'s reference to exemption as a retention option, along with its concomitant failure to mention § 522(f)'s lien avoidance procedure as yet another retention option, is tantamount to a textual endorsement of the retain-and-keep-current option. There is no suggestion in the Code that a debtor can exempt property by making payments under a prepetition loan agreement, and lien avoidance is just that – lien avoidance. It is not, in and of itself, a retention option. Second, because we resolve this case on the plain language of the statute, we have no need to plumb the sparse legislative history or to resolve the parties' fundamental disagreement about whether enforcement of § 521(2)(A) and (B) would further, or undermine, the general policies of the Bankruptcy Code. We do observe, however, that nothing in the legislative history militates against the result we reach today. Nor does our ruling run counter to policy judgments plainly underlying the Code.

IV.

For the reasons stated, we believe that 11 U.S.C. § 521(2) unambiguously requires chapter 7 debtors wishing to retain property of the estate that secures a consumer debt to elect one of the retention options specified in 11 U.S.C. § 521(2)(A), and then to perform the elected option in accordance with 11 U.S.C. § 521(2)(B). We therefore *reverse* and *remand* to the BAP for further proceedings consistent with this opinion.

Reversed and remanded. No costs.

§ 521. Debtor's duties

The debtor shall –

(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs;

(2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate –

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;

(B) within forty-five days after the filing of a notice of intent under this section, or within such additional time as the court, for cause, within such forty-five day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and

(C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title;

(3) if a trustee is serving in the case, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(4) if a trustee is serving in the case, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title; and

(5) appear at the hearing required under section 524(d) of this title.

(2)

No. 03-950

Supreme Court, U.S.
FILED
MAR 17 2004
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In The

Supreme Court of the United States

BANKRUPTCY RECEIVABLES MANAGEMENT,

Petitioner,

v.

CHARLES and JULIE LOPEZ,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent does not find any misstatement of facts in the Petitioner's Statement of the Case that would affect an analysis of the question presented to this Court. Respondent provides the following supplemental facts:

Debtors were not represented by an attorney at the time they signed the Post Discharge Property Retention Agreement (PDPRA). A representative of Bankruptcy Receivable Management (BRM) contacted Mr. Lopez and told him he "had to sign" the PDPRA. The representative of BRM did not discuss any other options, did not explain that he had the right to return the jewelry, did not explain the terms of the second post discharge agreement, and did not suggest that the debtors seek legal advice.

After signing the PDPRA, the debtors realized they could not afford the payments and offered to return the property to BRM, but BRM insisted that the debtors make payments according to the PDPRA. When the debtors were unable to make the payments under the terms of the PDPRA, BRM threatened to sue the debtors.

REASON TO DENY THE PETITION

The Petition for Writ of Certiorari does not focus on the core issue of this case and that is the legality of the PDPRA. "The validity of the contract is the central claim of both parties." *Bankruptcy Receivables Management v. Lopez* (*In re Lopez* 345 F.3d 70) (9th Cir. 2003) at 706. The PDPRA was essentially a reaffirmation agreement, without the protection afforded a consumer in 11 USC § 524(c) and (d). The so called "fourth option" that was outlined in

, 139
McClelland Fed. Credit Union v. Parker (*In re Parke*; the
F.3d 668 (9th Cir. 1998), was only one of the reaso
Ninth Circuit found the PDPRA was invalid.

l the
Respondent believes that the Petitioner misstated in
Ninth Circuit's position in *In Re Lopez* when they sta y on
their petition that the Ninth Circuit focused *exclusi* Peti-
the debtors' and BRM's rights under *In Re Parker*
tioner's Writ, page 10).

The Court also found:

> "The Lopezes were entitled to the protections
> § 524(c) of the Bankruptcy Code because the ne
> agreement was based "in part" on the discharge
> debt."
>
> *In Re Lopez* at 70

The Court went on to say:

> "BRM's attempt to reaffirm the debt does n
> comport with § 524(c) of the Bankruptcy Cod
> The agreement was entered after the discharg
> of the debt, contrary to § 524(c)(1), and was n
> filed with the court and reviewed by Lopeze
> counsel, contrary to § 524(c)(3). This agreemer
> cannot be a valid reaffirmation agreement."
>
> *In Re Lopez* at 70

one
If the only question before this Court is th this
presented in the Petitioner's Writ, then the decision the
Court, no matter which way it decides, will not affe
outcome of this case.

w, I
As an attorney who only practices Bankruptcy is is
would welcome the *Parker* decision to be upheld;

simply not the right case to bring the *Parker* issues before this Court.

In addressing Petitioner's argument concerning the *Parker* issue, this Court already declined to review *In Re Parker* when they denied certiorari in that case. Nothing has changed since then.

In Re Parker is well reasoned and a thorough analysis of the issues raised in 11 USC § 521(2) and why it is not and should not be binding on the debtor. The case eloquently speaks for itself on these issues.

Petitioner ignores the fact that it, and all creditors, retain its State Law rights when it comes to preservation of collateral. Because a bankruptcy does not terminate a creditor's security in the collateral, the debtors still cannot waste the collateral and must return it if they cannot or will not pay for it. A creditor is, therefore, not harmed by the decision *In Re Parker*.

Reaffirmation and retention agreements should be incentives for the debtor to continue a formal relationship with the creditor and should not be used as a hammer to drive the debtor into submission.

This case is a perfect example of why the Bankruptcy Code requires Court overview of Reaffirmation Agreements. 11 USC § 524(c).

If, after the bankruptcy, where the debtor has neither reaffirmed nor redeemed the collateral and is in breach of contract, the creditor needs to make the decision: do they want the collateral or do they want the money? If it is money they want, then they need to work with the debtor. If they don't have faith in the debtor, then they need to

repossess the collateral and be done with their dealing with the debtor.

There is nothing in the Bankruptcy Code that prevents the debtor and the creditor from reaching a mutual agreement to redeem the collateral after the bankruptcy.

CONCLUSION

For the above-mentioned reasons, BRM's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

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REPLY BRIEF

Petitioner, Bankruptcy Receivables Management ("BRM"), hereby respectfully submits this Reply Brief.

Summary of Points

A. This case involves only issues of federal bankruptcy law, especially: Does a Chapter 7 debtor have a *Parker* retention "right"? Five circuits have flatly rejected the notion that any such right exists; four have held that it does or may exist under certain circumstances. Obligated to follow its circuit precedent, regardless of how erroneous it may now be shown to be, the Ninth Circuit panel below held that because the Debtors had a pre-existing *Parker* retention "right", there was no new consideration for the PDPRA,[1] and invalidated it on that basis. This Court will be asked to find, as five circuits have, that the Debtors had no such "right" to discharge their debt to BRM and continue to retain the Property, and thus that it was clear legal error for the PDPRA to be declared invalid on that basis.

B. The damaging effects of the now full evolution of such a "right" are clearly manifested in this case in at least two important respects. Because this "right" has been judicially created at the circuit level, only this Court can provide the relief to which BRM is entitled – reversal of the Ninth Circuit's invalidation of the PDPRA.

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[1] Terms defined in the Petition have the same meanings here.

A. The Central Issue is Whether the Debtors Had a *Parker* Retention "Right"

Contrary to vague contentions suggesting otherwise in the Brief in Opposition, the Ninth Circuit below did, in fact, focus exclusively on rights and prohibitions under the Bankruptcy Code, and nothing else. Indeed, it said so itself: "Because the agreement [the PDPRA] is invalid under federal bankruptcy law, there is no need to review the agreement pursuant to California contract law." *Bankruptcy Receivables Management v. Lopez*, 345 F.3d 701, 710 (9th Cir. 2003) (App. 18). Again, using the court's own words, it framed the issue as follows:

> This case addresses the question of whether a creditor may enforce a post-bankruptcy discharge agreement entered into with a debtor retaining the collateral pursuant to its ***rights*** under *McClellan Fed. Credit Union v. Parker (In re Parker)*. . . . (emphasis added).

Lopez, 345 F.3d at 703.

The principal issue this Court will be asked to decide is whether the Debtors had any such *Parker* retention "right". *McClellan Fed. Credit Union v. Parker*, 139 F.3d 668 (9th Cir. 1998). The Ninth Circuit below observed: "In *Parker*, we noted that the circuits were evenly split on whether . . . a debtor may retain the property . . . without reaffirming the debt. This disagreement among the circuits . . . continues to exist." *Lopez*, 345 F.3d at 707. Five courts of appeal, applying the "plain meaning" of Bankruptcy Code §521(2) (mandating that a debtor perform certain duties), have categorically rejected the notion that any such unexpressed retention "right" exists. They have held that a Chapter 7 debtor has entirely no right to discharge his debt to a secured creditor and continue to retain its collateral without either reaffirming that debt or

redeeming such collateral. The Ninth Circuit, however, held that, although not specifically provided by Congress, the Debtors had just such a "right" to discharge their debt to BRM and yet retain its secured property without performing anything under §521(2).

This supposed "right", which has been careening about and doing damage in consumer bankruptcy cases for more than a decade now, has had the specific adverse and litigation-engendering effects pointed out in BRM's petition. Petition at 22-30. Contrary to the standard the Debtors in their Brief in Opposition suggest for this Court's consideration of cases for review, no case can or will represent all of the adverse consequences flowing out of a *Parker* retention "right". That is no reason not to accept this case for review. As briefly explained below, more than adequately represented in this case are both a primary and a secondary adverse consequence, however, and the Court's taking up of this matter and determining whether such a "right" exists will result in substantial relief to BRM here and in a full resolution of all of the adverse consequences emanating from such a "right".

1. Nullification of Consideration

The Ninth Circuit panel below was bound by *Parker* to find that the Debtors had a pre-existing *Parker* retention "right" to retain the Property simply by continuing to make payments. BRM's forbearing from exercising its surviving *in rem* rights and repossessing the Property, and its permitting the Debtors to retain its collateral through the PDPRA thus provided no new consideration, said that court, thereby invalidating the PDPRA:

> BRM's supposed consideration, forbearing its foreclosure right in exchange for the repayment of the discharged debt, is hardly additional consideration because under *Parker* the Lopezes were entitled to retain the jewelry and continue to make payments.[2]

Lopez, 345 F.3d at 710. BRM contends that the Debtors had no such *Parker* retention "right", and would commend to the Court the First Circuit's decision in *In re Burr*, 160 F.3d 843 (1st Cir. 1998) (App. 107), which decisively discredits the notion that any such "right" exists. Since no such pre-existing retention "right" existed, BRM's agreement through the PDPRA to permit the Debtors to retain the Property did, indeed, provide ample consideration and the Ninth Circuit's invalidation of the PDPRA represents clear error of law. This alone warrants granting the Petition.

This case compellingly illustrates just how far reaching the damaging effects can be over time when a circuit court (particularly in a highly-recurring setting[3]) creates for an individual Chapter 7 debtor a previously non-existent "right" and, without then recognizing the various consequences later ensuing from its proclamation, projects that supposed "right" into Congress' balanced, comprehensive and inter-related Bankruptcy Code. Here, a *Parker* retention "right", which five circuits say simply does not

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[2] The Ninth Circuit ignored the fundamental fact, admitted by the Debtors, that the Debtors had not continued to pay BRM.

[3] There were more than 1,155,000 individual Chapter 7 filings in 2003, according to statistics compiled by the Administrative Office of United States Courts.

exist, has had the effect of nullifying that which was heretofore recognized to be legal consideration.

This Court can and should determine that no such highly-dubious retention "right" exists and with that restore the long-accepted view embraced by this Court, which the decision below effectively undercuts, that surviving *in rem* rights provide independent consideration that may support a forbearance agreement such as the PDPRA. See *Johnson v. Homestate Bank*, 501 U.S. 78, 83, 111 S.Ct. 2150, 2153, 115 L.Ed 2d 66 (1991) ("Notwithstanding the discharge, the [secured creditor's] right to proceed . . . *in rem* survived the Chapter 7 liquidation).

Upon determining that no such "right" exists, debtors in the Ninth Circuit and elsewhere, desiring to retain secured property, will, as Congress intended, choose to either redeem that property, or, more likely, enter into binding, bankruptcy court-supervised reaffirmation agreements with their secured creditors, rather than routinely rejecting such Congressionally sanctioned agreements, just as the Debtors did here.

2. Re-establishing Established Law and "Cleaning Up the Environment"

The alternative basis for the Ninth Circuit's invalidating the PDPRA was that it was a "disguised" reaffirmation agreement, with the court finding that because the amount expressed in the PDPRA was roughly equivalent to the amount of the discharged debt, the consideration for the PDPRA ***was*** the discharged debt. Because the PDPRA did not comply with Bankruptcy Code §524(c) (dealing with the requisites of a reaffirmation agreement, reaffirming a discharged debt), it was declared invalid.

As explained in the Petition (p. 27), that equivalence will always exist in such a post-bankruptcy agreement where, as here, the surviving *in rem* rights (generally, the value of the collateral), which provide the independent consideration for such an agreement, exceed the amount of the discharged debt.

The Ninth Circuit, required to follow the altogether defective construct of *Parker* under which virtually no such agreement, however valid it might be, could be squared or reconciled with *Parker*, declared it invalid as violative of §524(c). That provision, however, is implicated and can only be violated where the consideration for the agreement is the discharged debt. Here, the consideration was not the discharged debt but BRM's surviving *in rem* rights. And where, as here, those *in rem* rights exceeded the discharged debt, the amount expressed in the PDPRA, of necessity, would indeed be in the amount of (or close to) the discharged debt, since a creditor may realize on its *in rem* rights in an amount up to the debt, whether it has been discharged or not.

The Ninth Circuit never addressed the point that the value of the Property exceeded the discharged debt (nor that the PDPRA – anticipating this very misguided contention – openly recited that it was ***not*** a reaffirmation agreement). Badly blurring this Court's distinction in *Johnson v. Homestate Bank* between a discharged debt and the *in rem* rights that may be realized upon up to the amount of such debt, the Ninth Circuit came to the altogether simplistic, knee-jerk conclusion that because the amount set forth in the PDPRA was roughly equivalent to the amount of the discharged debt, the consideration for the PDPRA ***was*** the discharged debt. The Ninth Circuit's analysis on this point, shadowed as it was by *Parker*, was

incomplete, imprecise and manifestly wrong, and, with its summarily-made conclusion, represents a second clear error of law, which this Court can and should reverse.

Finally, it must be emphasized that this issue arises and, until resolved by this Court similar such embarrassingly-abundant post-bankruptcy disputes and litigation will continue to arise, chiefly because in the environment fostered by *Parker* virtually no reaffirmation agreements are entered into between Chapter 7 debtors and their secured creditors in the Ninth Circuit (or other "fourth option" circuits). The inevitably on-going post-bankruptcy communications and dealings between those parties thus wind up being carried out in an uneasy, uncertain, agreement-less, litigation-engendering void, which is entirely at odds with the certainty that Congress intended and plainly provided for in Bankruptcy Code §521(2). Despite this highly in-conducive post-*Parker* environment, the PDPRA was and remains perfectly valid and enforceable, and, as this Court will find, did not run afoul of even the Ninth Circuit's misguided view of federal bankruptcy law.

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